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THE INDIAN EVIDENCE ACTS

I. AND XVIII. OF 1872.

THE INDIAN EVIDENCE ACTS

I. AND XVIII. OF 1872,

WITH AN

*INTRODUCTION ON THE PRINCIPLES OF JUDICIAL
EVIDENCE,*

AND

COMMENTARIES;

ALSO,

THE INDIAN OATHS ACT, X. OF 1873; AND OTHER
ACTS AND APPENDICES.

BY

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COMMENTARIES ON "THE INDIAN TRUSTS ACT, 1882," ON "THE INDIAN EASE-
MENTS ACT, 1882," ON "THE INDIAN CODE OF CRIMINAL PROCEDURE,"
ON "THE INDIAN CODE OF CIVIL PROCEDURE AS MODIFIED
UP TO 1ST JULY, 1888;" AND OF "A TREATISE ON
INTRINSIC EVIDENCE CONTROLLING DOCU-
MENTS OF TITLE," &c.

"Thou shalt not bear false witness against thy neighbour."—EXODUS xx. 16;
DEUTERONOMY v. 20.

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THE INDIAN EVIDENCE ACT, 1872.

INTRODUCTION.

THE want of a knowledge of the law of evidence and of a more skilful use of its principles by some Indian practitioners was strikingly shown by the observations of Sir John Stuart, C.J., and Mr. Justice Tyrrell in an appellate civil case. They said : “ In fact, taking and recording evidence is a judicial duty which, in these provinces, is performed in a manner which, to say the least, is most perfunctory, so much so as to make the so-called depositions in many, if not in most cases, utterly useless for the purposes of justice. The want of skill in this respect is specially and sadly observable in native Judges, who seem altogether unacquainted with the manner in which witnesses should be examined. A witness’s cause of knowledge of facts to which he deposes is scarcely ever shown, and it is not too much to say that nine-tenths of the depositions which are brought before us scarcely contain a single word of evidence properly so called. Nor, as a rule,

are the parties themselves to a suit examined, although they must necessarily be acquainted with the facts of their own case. Even in this High Court pleaders of eminence and of undoubted ability and learning are often seen to read and to argue with all the composure of the most serious advocacy on the miserable contents of such worthless documents. In fact, many judicial officers and pleaders, certainly those in the districts, seem utterly ignorant of the subjects of evidence, and anything like the logical development of a witness's knowledge of facts is a legal desideratum which we fear it is hopeless to expect."—*P. Kuar v. S. Pandey* (I. L. R. 4 A. S. 249).

At the period when these remarkable observations were made more than one edition of the Indian Evidence Act of 1872 had been published ; but the meaning of the rules of the new code had not been so fully explained, and their application illustrated, as they now have been by cases decided on appeal to the four High Courts.

One writer of repute is of opinion that the author of the Act would have produced a more useful measure had he comprehended within its sections branches of the law of evidence which Mr. Taylor has commented upon in his great work upon the English Law of Evidence. It is but fair to say that that author admits that he has omitted, intentionally omitted, several most important titles of law which might have been included. We have endeavoured to supply in our notes these omissions, not by citations from other

writers but by extracts from or references to the Indian Statute Book. It may, however, interest and instruct our readers to have before them the plan of the Act as delineated by its author. He says:

“I. In judicial inquiries the facts which form the materials for the decision of the Court are the facts that certain persons assert certain things under certain circumstances. These facts the judge hears with his own ears. He also sees with his own eyes documents and other things respecting which he hears certain assertions.” *

II. His task is to infer—

(1.) From what he himself hears and sees, the existence of the facts asserted to exist;

(2.) From the facts which on the strength of such assertions he believes to exist other facts which are not so asserted to exist.

III. Each of these inferences is an inference from the effect to the cause, and each ought to conform to the method of difference; that is to say, the circumstances in each case should be such that the effect is

* Out of respect to the learned author we have made the extracts numbered I.—VI. Number I. is extracted verbatim, but is neither grammatical nor intelligible in its present form. The printer probably should have printed something similar to what follows: “The facts which form the material for judicial decision, if facts they be, are the allegations which certain witnesses make, orally in the witness book or by affidavit taken elsewhere, respecting certain persons under certain circumstances. Such circumstances are not confined to the facts alleged, but include the demeanour, accuracy, truthfulness, and means of observation of any witness who deposes to any fact.”

inconsistent (subject to the limitations contained in the following paragraphs) with the existence of any other cause for it other than the cause of which the existence is proposed to be proved.

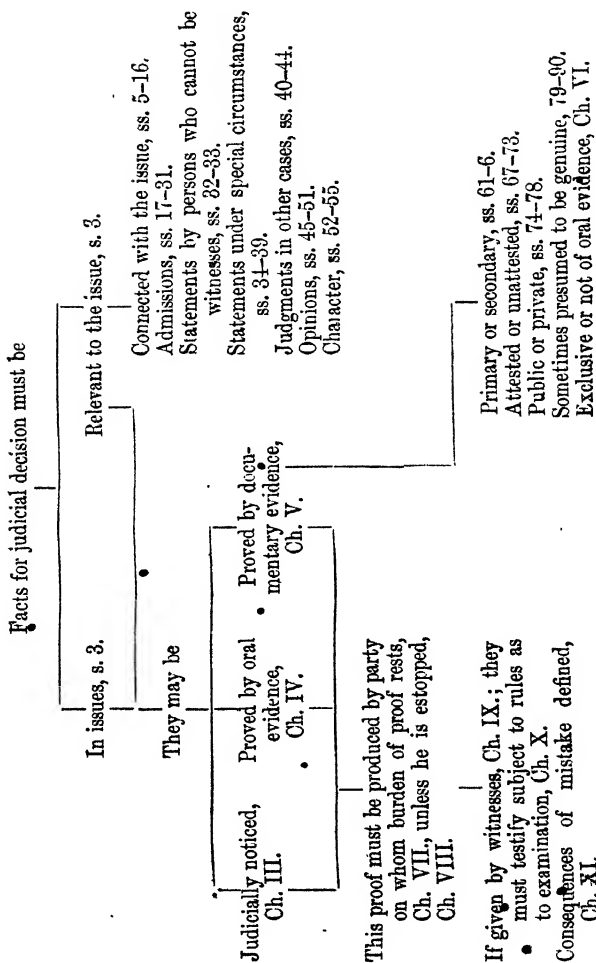
IV. The highest result of judicial investigation must generally be to show that certain conclusions are more or less probable.

V. The question, "What degree of probability is it necessary to show in order to warrant a judicial decision in a given case?" is a question not of logic but of prudence, and is identical with the question, "What risk of error is it wise to run, regard being had to the consequences of error in either direction?"

VI. This degree of probability varies in different cases which cannot be strictly defined, but wherever it exists it may be called moral certainty. Such being the author's principles, we now proceed to give the following index plan of the legislative measure which he framed.

The object of legal proceedings is the determination of rights and liabilities which depend on facts.

Section 3 defines the meaning of the words "fact," "relevant" and "facts in issue." The plan will therefore read thus :—



The remarks of the learned draftsman are pregnant with meaning, and we regret that the quickness of mind and conciseness of expression which are to be found in the Act have rendered the exposition of his theory wanting in scope and explicitness—

“Brevis esse laboro,
Obscurus fio.”

We therefore proceed to make a few additional remarks on the principles or philosophy of evidence which are based on the nature of the human mind.

The principle of the method of agreement * is this: If two or more instances of phenomena investigated have only one circumstance in common, that circumstance may be regarded with more or less probability as the cause or effect of the given phenomena, or at least as connected with it through some fact of causation; whatever can be eliminated is not connected with the phenomena.

The principle of the method of difference is, this: If an instance in which a phenomenon occurs, and instances in which it does not occur, have every circumstance in common save one, that one occurring only in the former, the circumstance in which the two differ is effect or cause, or necessary part of the effect or cause, of the former phenomenon. Whatever

* The methods of agreement and disagreement are in reality older than Locke, and form an essential element in the induction of the Baconian system of philosophy as developed by Lord Chancellor Verulam. For the use of the inductive process in reasoning upon evidence consult the note to section 166.

cannot be eliminated is connected with the phenomena by this principle.

The method of agreement is open to the objection or characteristic imperfection that error may be induced by a plurality of causes. Where the method of agreement is capable of being tested by the method of difference, we have a guarantee for accuracy which does not exist where we can prove by the method of agreement alone.

The principle of probability requires explanation. We take that of Bishop Butler, who reasoned thus : * That the slightest possible presumption is of the nature of a probability, appears from hence : that such low presumption often repeated will amount even to a moral certainty. Thus a man's having observed the ebb and flow of the tide to-day affords some sort of presumption, though the lowest imaginable, that it may happen again to-morrow : but the observation of this event for so many days and months and ages together, as it has been observed by mankind, gives us a full assurance that it will. That which chiefly constitutes probability is expressed in the word *likely*, that is, like some truth or true event (*verisimile*) ; like it in itself, in its evidence, in some more or fewer of its circumstances." A chance is but a degree of probability ; there may be a chance where there is no probability. A chance affords a possibility ; many chances are requisite to constitute a probability.

* 'Analogy of Religion, Natural and Revealed, to the Constitution and Course of Nature.'

Probability depends upon experience. "When we determine a thing to be probably true, suppose that an event has or will come to pass, it is from the mind's remarking in it a likeness to some other event which we have observed has come to pass. And this observation forms in numberless daily instances a presumption, opinion, or full conviction that such event has or will come to pass; according as the observation is that the like event has sometimes most commonly, or always, so far as our observation reaches, come to pass at like distances of time, or place, or upon like occasions. Hence arises the belief that a male child if it live twenty years will grow up to the stature and strength of a man; that food will contribute to the preservation of its life, and that want of it for such a number of days will destroy it. So likewise the rule and measure of our hopes and fears concerning the success of our pursuits, our expectations that others will act so and so in such circumstances, and our judgments that such actions proceed from such principles. All these rely on our having observed the like to what we hope, fear, expect, or judge. I say upon our having observed the like either with respect to ourselves or others.

"Probable evidence in its nature affords but an imperfect kind of information, and is to be considered as relative only to beings of limited capacities. For nothing which is the possible object of knowledge, past, present, or future, can be probable to an infinite intelligence, since it cannot but be discerned abso-

lutely, as it is in itself, certainly true or certainly false. But to us probability is the very guide of life.

“From these things it follows that in questions of difficulty, or such as are thought so, where more satisfactory evidence cannot be had or is not seen, if the result of the examination be that there appears on the whole any, the lowest, presumption on one side and none on the other, or greater presumption on the one side, though in the lowest degree greater, this determines the question even in matters of speculation; and in matters of practice will lay us under an absolute and formal obligation in point of prudence and of interest to act upon that presumption or low probability, though it be so low as to leave the mind in very great doubt which is the truth.” Conveyancers frequently have to act on low probabilities. But in contentious proceedings the law requires greater certainty. Thus, when a person is accused, it presumes him to be innocent until such presumption is displaced by cogent evidence, though such evidence need not remove every doubt. When a plaintiff brings an action, the burden of proving his assertions lies upon him, and the defendant need only deny the claim—until evidence thereof is adduced.

Probability is defined by Locke as a likeliness to be true.* Wanting the intuitive evidence which infallibly determines the understanding and produces certain knowledge, the mind, if it would proceed

* ‘Essay concerning Human Understanding,’ Bk. IV. ch. xv.

rationally, ought to examine all the grounds of probability and see how they make more or less for the proposition before it assents to or dissents from it ; and upon a due balancing of the whole reject or receive it with a more or less firm assent proportionably to the preponderance of the greater grounds of probability on the one side or the other.

A knowledge of human nature is one kind of knowledge from which to judge of probability. So says the Eastern proverb, "As face reflected by water answereth face, so the heart the heart of man." Such a knowledge shows what variations are possible or probable. Cicero, the unrivalled orator of the Latin forum, with more conciseness than Locke and Butler, and with more practical explanation than the proverb, thus expounds the doctrine: "A narration will be probable if in it those characteristics are visible which are usually apparent in truth, if the dignity of the persons mentioned is preserved ; if the causes of the actions performed are made plain ; if it shall appear that there were facilities for performing them if the time was suitable ; if there was plenty of room ; if the place is shown to have been suitable for the transaction which is the subject of the narration ; if the whole business, in short, be adapted to the nature of those who plead and to the reports bruited about among the common people, and to the preconceived opinions of those who hear, and if these principles be observed the narration will appear like the truth."—*Rhetorical Invention*, Bk. I. ch. xxi.

Doctor Paley's observations on undesigned coincidences are valuable: "Undesignedness of agreements (which undesignedness is gathered from their latency, their minuteness, their obliquity, the suitableness of the circumstances in which they consist to the places in which those circumstances occur and the circuitous references by which they are traced out) demonstrates that they have not been produced by meditation or by any fraudulent contrivance. But coincidences from which these causes are excluded and which are too close and numerous to be accounted for by accidental coincidences of fiction, must necessarily have truth for their foundation." (Paley's *Evidences*, Part II. ch. vii.) "If a coincidence depend upon a comparison of dates, or rather of circumstances from which the dates are gathered—the more intricate that comparison shall be, the more numerous the intermediate steps through which the conclusion is deduced: in a word, the more circuitous the investigation is, the better—for the agreement which finally results is thereby farther removed from the suspicion of contrivance, affectation, or design. And it should be remembered concerning these coincidences, that it is one thing to be minute and another to be precarious; one thing to be unobserved and another to be obscure; one thing to be circuitous or oblique and another to be forced, dubious, or fanciful."

In some cases judgments — that is acts of the mind by which one thing is affirmed or denied of another—are formed as soon as the terms of the pro-

position are understood. That is, they result so necessarily from the original constitution of the mind that we act upon them from our earliest infancy without ever making them an object of reflection. In other cases they are formed in consequence of a process of thought consisting of different successive steps. Hence a distinction of evidence into intuitive and deductive.

The most important if not all the different species of intuitive evidence may be comprehended under the three following heads:—(1) The evidence of axioms. (2) The evidence of consciousness, of perception and of memory. (3) The evidence of those fundamental laws of human belief which form an essential part of our constitution; and of which our entire conviction is implied not only in all speculative reasonings but in all our conduct as acting beings. Of this class is the evidence for our own personal identity; for the existence of the material world; for the continuance of those laws which have been found in the course of our past experience to regulate the succession of phenomena. Such truths no man ever thinks of stating to himself in the form of propositions; but all our conduct and all our reasonings proceed on the supposition that they are admitted. The belief of them is necessary for the preservation of our animal existence, and it is accordingly coeval with the first operations of the intellect, “When the mind,” says Locke, “perceives the agreement or disagreement of two ideas immediately by themselves without the

intervention of any other, its knowledge may be called intuitive. When it cannot so bring its ideas together as by their immediate comparison, and, as it were, juxtaposition or application one to another, to perceive their agreement or disagreement, it is fair, by the intervention of other ideas, one or more as it happens, to discover the agreement or disagreement which it searches, and this is what we call reasoning."

Deductive evidence is of two kinds: Demonstrative and Probable. The former relates to necessary, the latter to contingent, truths. The process of the mind whereby an advocate discovers modes of proof for establishing the truth of doubtful propositions and also the process by which we bring new truths to light is properly called invention. In this power of the mind remarkable inequalities are observable among different individuals. In a capacity of understanding the reasonings of others, all men seem to be nearly on a level: Stewart's *Moral Philosophy*.

Judgment, inferior to knowledge in respect of intensity, plays quite as important a part in human action and speculation and a more important one in jurisprudence.

It is that faculty which takes ideas to agree or disagree; facts or propositions to be true or false by the aid of intervening ideas, whose connexion with them is either not constant and immutable or is not perceived to be so; the foundation of this is the probability or likelihood of that agreement or disagreement of that truth or falsehood, deduced or presumed, from

its conformity or repugnancy to our knowledge, observation, and experience.

Persuasion resulting from judgment may be assurance, confidence, confident belief, belief, conjecture, guess, doubt, wavering, distrust, disbelief. — Best's *Evidence*.

The principles of legal evidence by virtue of which the rules of law are applied to the affairs of every day life need, even more than the rules, illustrative cases to explain their meaning and use. On the other hand, the principles being of a practical nature, such cases are likely to be numerous, and many of them, if not most, simple repetitions of previous applications, so that the duty of selecting the best in a sufficient number is greater and more difficult.

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THE INDIAN EVIDENCE ACT, 1872.

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PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.
(Received the assent of the Governor-General on the 15th March, 1872.)

THE INDIAN EVIDENCE ACT, 1872.

Seeing that the words Evidence, Testimony, and Proof are to some extent synonymous, it will be useful to define and explain them.

Evidence is whatever makes evident; Testimony is that which is derived from an individual, namely, *testis*, the witness. Proof is sometimes used as synonymous with positive legal evidence of a particular fact. More definitely speaking, it is the result or effect of the evidence produced in affirmation or negation of an alleged fact.

Where the evidence of our own senses concurs with the testimony of others we can have no grounds for withholding our assent to the truth of an assertion; but when these are at variance it may be prudent to pause. Evidence may comprehend the testimonies of many; testimony is confined to the testimony of one. Where a body of respectable evidence tends to convict a criminal of guilt the jury

cannot attach much weight to the partial testimonies of one or two individuals. The evidence serves to inform and illustrate, the testimony serves to confirm and corroborate; we may give evidence exclusively with regard to things, but we bear testimony with regard to persons. In all law suits respecting property, rights, and privileges, evidence must be heard in order to substantiate or invalidate a case; in personal or criminal indictments the testimony of witnesses is required either for or against the accused person. The evidence and proof are both signs of something existing; the evidence is an evident sign, the proof is positive; the evidence appeals to the understanding, the proof to the senses; the evidence produces conviction or a moral certainty, the proof produces satisfaction or a physical certainty.

The term evidence is applied to that which is moral or intellectual; proof is employed mostly for facts or physical objects. The parables and conversations of the founder of Christianity may be called evidences of His Divine character. But His numerous miracles or supernatural operations are called proofs of His Almighty power. Evidence may be internal or lie in the thing itself; proof, even as the effect of evidence, is external.

The words apparent, visible, clear, plain, obvious, evident, manifest, are terms of frequent use in discussions whose object is to affirm the truth of an alleged fact or to deny it. It may therefore be of service to sketch their shades of meaning.

Apparent, in Latin *apparens*, participle of *appareo*, to appear, signifies the quality of appearing.

Visible, in Latin *visibilis*, from *visus*, participle of *video*, to see, signifies capable of being seen.

Clear, in French *clair*; German, Swedish, &c. *klar*; Latin, *clarus*; Greek, *γλαυρός*, comes from *γλαύσσω*, to shine.

Plain, in Latin *planus*, even, signifies what is so smooth and unincumbered that it can be seen.

Obvious, in Latin *obvius*, compounded of *ob* and *via*, signifies the quality of lying in one's way or before one's eyes.

Evident, in French *evident*; Latin *evidens*, from *video*; Greek, *εἶδω*; Hebrew, *ido*, to know, signifies as good as certain or known.

Manifest, in French *manifeste*; Latin, *manifestus*, compounded of *manus*, the hand, and *festus*, participle of *fendo*, to fall in, signifies being so near that it can be laid hold of by the hand.

These words agree in expressing various degrees in the capability of seeing, but visible is the only one used purely in a physical sense; apparent, clear, plain, obvious, are used physically and morally; evident and manifest solely in a moral acceptation. That which is simply an object of sight is visible; that of which we see only the surface is apparent; the stars themselves are visible to us, but their size is apparent; the rest of these terms denote not only what is to be seen, but what is easily seen. They are all applied as epithets to objects of mental discernment.

What is apparent appears but imperfectly to view, it is opposed to that which is real: what is clear is to be seen in all its bearings, it is opposed to that which is obscure: what is plain is seen by a plain understanding, it requires no deep reflection nor severe study, it is opposed to what is intricate: what is obvious presents itself readily to the mind of every one; it is seen at the first glance, and is opposed to that which is abstruse: what is evident is seen forcibly and leaves no hesitation on the mind, it is opposed to that which is dubious: manifest is a greater degree of the evident, it strikes on the understanding and forces conviction, it is opposed to that which is dark.

A contradiction may be apparent; on closer observation it may be found not to be one: a case is clear, it is decided on immediately: a truth is plain, it is involved in no perplexity, it is not multifarious in its bearings: a falsehood is plain, it admits of no question: a reason is obvious, it flows out of the nature of the case: a proof is evident, it requires no discussion, there is nothing in it that clashes or contradicts; the guilt or innocence of a person is evident when everything serves to strengthen the conclusion: a contradiction or absurdity is manifest which is felt by all as soon as it is perceived.

Preamble. WHEREAS it is expedient to consolidate, define and amend the Law of Evidence; It is hereby enacted as follows:—

PART I.

RELEVANCY OF FACTS.

CHAPTER I.

PRELIMINARY.

- Short title. **1.** This Act may be called “The Indian Evidence Act, 1872”:
- Extent. It extends to the whole of British India, and applies to all judicial proceedings in or before any Court, including Courts Martial, but not to affidavits presented to any Court or officer, nor to proceedings before an arbitrator;
- Commence-
ment of Act. And it shall come into force on the first day of September 1872:

This section was repealed as to European Courts-Martial by the Mutiny Act, 1875 (38 Vict. c. 7), s. 101, which enacted that “No court-martial shall in respect of the conduct of its proceedings, or the reception or rejection of evidence, be subject to the provisions of the Indian Evidence Act, or any Act of any legislature other than the Parliament of the United Kingdom.” A similar clause has been enacted in the Army Act, 1881 (44 & 45 Vict. c. 58), s. 127, which has now taken the place of the Mutiny Act.

This Act has been declared in force in Upper Burmah, Act XX. of 1866, Sched. II. Pt. 1.

It is included in the schedule to the Santal Parganas Laws, Regulation III. of 1886.

It has been declared under the Scheduled Districts Act, 1874, to be in force in the following scheduled districts, namely :—

Hazaribágh, Lohardaga, and Manbhum, Pargana, Dhalbhum, and the Kolhan in the District of Singbhum.—*Gazette of India*, 1881, October 22, Pt. I. p. 504.

North - Western Provinces, in Jarai.—*Gazette of India*, 1870, September 23, Pt. I. p. 505.

Affidavits are admissible in certain courts in British Burma, Act XVII. of 1875, s. 91 ; in proceedings in High Court under Indian Trustees, Act XXVII. of 1866, s. 40 ; see Griffith's edition ; in Matrimonial Court, Act IV. of 1869, s. 51 ; in answering interrogatories, Griffith's *Civil Procedure Code*, Act XIV. of 1882, ss. 126, 127. For proof of service of criminal court summons in other jurisdiction, Griffith's *Criminal Procedure Code*, Act X. of 1882, s. 74, by collector adjudicating on chargeability of instrument with stamp duty, Act I. of 1872, s. 30 ; on application for discovery of relevant documents, Act XIV. of 1882, s. 197.

The Criminal Procedure Code, s. 539, and the Civil Procedure Code, s. 197, authorize certain persons to administer oaths and affirmations on taking affidavits.

The Indian Penal Code defines the offences and affixes the punishment of giving, fabricating, and using false evidence, ss. 191–196. See also Act X. of 1882, ss. 195, 339.

The High Court has power to make rules for the admission of affidavits in miscellaneous cases, and a

civil court may order any point to be proved by affidavit: Griffith's *Civil Procedure Code*, Act XIV. of 1882, ss. 194, 347. Applications in civil procedure to be supported by affidavit are for orders for inspection of documents, for production of records, for issue of distress warrant, of commission for examination of witnesses, for arrest or attachment before judgment, for appointment of next friend or guardian *ad litem*, by plaintiff on attaining majority for dismissal of suit, for rehearing of Presidency Small Cause Court suit before High Court: Griffith, ss. 195, 134, 137, 384, 477, 483, 447, 456, 453, 454, and Act. XV. of 1882, ss. 53 and 38. An application for transfer of a criminal case by order of High Court is also to be so supported, *Criminal Procedure Code*, by Griffith, Act X. of 1882, s. 526. Declarant may be ordered to attend for cross-examination, Act XIV. of 1882, s. 195.

An arbitrator does wrong in receiving and using as evidence a document which ought not to be received. Where he improperly admitted a letter written without prejudice the judge held that it was not a sufficient ground for refusing to confirm the award: *Howard v. Wilson* (I. L. R. 4 C. S. 231).

Repeal of
enactments.

2. On and from that day the following laws shall be repealed:—

(1.) All Rules of Evidence not contained in any Statute, Act, or Regulation in force in any part of British India:

(2.) All such rules, laws, and regulations as have acquired the force of law under the twenty-fifth section of "The Indian Councils Act, 1861," in so far as they relate to any matter herein provided for; and

(3.) The enactments mentioned in the schedule hereto,

to the extent specified in the third column of the said schedule.

But nothing herein contained shall be deemed to affect any provision of any Statute, Act, or Regulation in force in any part of British India and not hereby expressly repealed.

As to when and how documents not duly stamped are receivable in evidence, see Act I. of 1879, ss. 31, 39, 34, 50. Documents compulsorily registrable but not registered are not receivable except generally in a suit to set aside order of refusal to register, Act III. of 1877, ss. 49, 77; Act XVII. of 1879.

Though the Hindu law of evidence is superseded, a list of some of its technical terms may be instructive and useful. *Pramanam* signifies the nature of proof; *manushya pramanam*, human proof or evidence; *divijapramanam*, divine proof, such as an oath, or an ordeal; *likhita*, writings or documents; *sakshi*, witnesses; *bhukti*, enjoyment; *krujapada*, production of evidence: see *Mayukha*, chapters I. and II.

Formerly it was a rule of Hindu law that "If a question arose among co-heirs in regard to the fact of partition it must be ascertained by the evidence of kinsmen, by the record of distribution, or by the separate transaction of affairs: *Daya Bhagha*. But see section 2 (1), which removes technicalities from the Law of Evidence to a great extent.

The English Statutes relating to evidence in India are:—

13 Geo. 3, c. 63, ss. 40, 42, 44, 45, Government of India.

21 Geo. 3, c. 70, s. 6, Government of India.

26 Geo. 3, c. 57, ss. 28, 38, Procedure in Parliament against Indian Offenders.

3 & 4 Will. 4, c. 41, ss. 7, 13, Appeals to Judicial Committee.

11 & 12 Vict. c. 21, s. 77, Insolvent Debtors.

19 & 20 Vict. c. 113, Evidence before Foreign Tribunals.

22 Vict. c. 20, Taking Evidence out of Jurisdiction.

33 Vict. c. 14, s. 12, Naturalization.

33 & 34 Vict. c. 52, ss. 14, 15, 24, Extradition.

———— c. 102, s. 1, Oaths of Allegiance on Naturalization.

36 & 37 Vict. c. 60, ss. 4, 5, Extradition.

44 & 45 Vict. c. 58, ss. 52, 125, 163–165, Army.

ACTS OF THE GOVERNOR-GENERAL IN COUNCIL RELATING TO EVIDENCE.

XX. of 1847, s. 3, Copyright.

XIX. of 1850, s. 2, Binding Apprentices.

XXXII. of 1855, s. 7, Ports and Port Dues.

XXV. of 1857, s. 6, Forfeitures.

XXI. of 1860, s. 19, Registration of Societies.

XLV. of 1860, ss. 179, 201, Penal Code.

III. of 1867, ss. 10, 11, Public Gambling.

XXV. of 1867, ss. 7, 8, Printing Presses and Books.

IV. of 1869, s. 51, Divorce.

V. of 1869, Art. 111–113, 122, 124, 128, Native Articles of War.

XX. of 1869, s. 6, Volunteers.

XXXIII. of 1871, s. 9, Land Revenue, Punjab.

I. of 1872, Evidence.

III. of 1872, s. 14, Marriage.

XV. of 1872, s. 80, Marriage of Christians.

XVIII. of 1872, Evidence.

V. of 1873, s. 8, Savings Banks.

- XIX. of 1873, ss. 215–219, Land Revenue, N.W.P.
- V. of 1875, s. 1, Unattested Sepoys.
- XVII. of 1875, ss. 20, 91, Burma Courts.
- XX. of 1875, ss. 11, 12, Central Provinces, Laws.
- III. of 1876, ss. 33, 54, 90, Burma Labour.
- XI. of 1876, s. 18, Presidency Banks.
- XVIII. of 1876, s. 19, Oudh Laws.
- III. of 1877, ss. 49, 77, Registration.
- VII. of 1878, s. 71, Forests.
- I. of 1879, ss. 31, 34, 39, 50, Stamps.
- II. of 1879, s. 2, Central Provinces—Evidence.
- XVII. of 1879, ss. 9, 56, Dekhan Ryots—Relief.
- XXI. of 1879, s. 19, Foreign Jurisdiction.
- XVIII. of 1881, s. 12, Petroleum.
- XV. of 1881, s. 16, Factories.
- VI. of 1882, Companies. See Griffith's edition.
- VII. of 1882, s. 4, Powers of Attorney.
- X. of 1882, Criminal Procedure. See Griffith's edition.
- XIV. of 1882, Civil Procedure. See Griffith's edition.

MADRAS, BOMBAY, AND BENGAL ACTS.

- Mad. Act III. of 1869, s. 5, Revenue Officers may summon Witnesses.
- Bomb. Act III. of 1866, s. 9, Gambling.
- Bomb. II. of 1874, ss. 48, 51, Jails.
- Bomb. II. of 1876, ss. 19, 29, 40, Land Revenue—Bombay City.
- Beng. IX. of 1880, s. 95, Cess.

REGULATIONS.

- Reg. I. of 1872, s. 3, Punjab Frontier.
- Reg. V. of 1872, s. 3, Sindh Frontier.
- Reg. I. of 1877, s. 29, Ajmere Frontier.

The provisions of the English Statutes and Indian Acts relating to Evidence may be classified under three heads—I. Production; II. Record; III. Admission and Rejection.

I. PRODUCTION.

Of witnesses in India, 13 Geo. 3, c. 63, s. 42; 26 Geo. 3, c. 57, s. 28.

Before Judicial Committee, 3 & 4 Will. 4, c. 41, s. 7.

Of testimony of deceased or incapable witness, 3 & 4 Will. 4, c. 41, s. 13.

Act for taking, in relation to civil and commercial matters before foreign tribunals, 19 & 20 Vict. c. 113.

Act to provide for taking, in places out of jurisdiction, 22 Vict. c. 20.

Procedure for obtaining in relation to criminal matters before foreign tribunals, 33 & 34 Vict. c. 52, s. 24, Act XXI. of 1879, s. 19; 36 & 37 Vict. c. 60, s. 5, Act X. of 1882, s. 503, Griffith's *Crim. P. C.*

Causing disappearance of, to screen offender, Act XLV. of 1860, s. 201.

Commission for examination of witnesses:—

Issue of in civil cases, on whose application, Act XIV. of 1882, ss. 383, 384, 386, 387, Griffith's *Civ. P. C.*

Issue of in proceedings for winding-up company by district judge, Act VI. of 1882, s. 171, Griffith's *Companies Act*.

For examination of absent applicant to sue *in forma pauperis*, Act XIV. of 1882, s. 406, Griffith's *Civ. P. C.*

In criminal cases, when and by what court, Act X. of 1882, ss. 503–507.

Relating to slave trade, power of High Court, 39 & 40 Vict. c. 46, s. 3, Act X. of 1882, s. 504, Griffith's *Crim. P. C.*

To administer special form of oath, Act X. of 1873, s. 10.

When confined in jail, conditions and mode of, Act XV. of 1869, ss. 12-14.

Under Native Converts Marriage Dissolution Act, Act XXI. of 1866, s. 20.

Inquiries by Collector into malversation by public servants, Mad. Reg. IX. of 1882, s. 3 (2).

By revenue officers, Mad. Act III. of 1869, s. 5.

By settlement officers, P. Act XXXIII. of 1871, s. 26.

To examine karnams, Mad. Reg. XXIX. of 1802, s. 17.

To examine palwaris, Ben. Reg. VIII. of 1793, s. 62 (6).

By registrar to examine persons exempt from personal appearance, Act III. of 1877, ss. 33, 38, 39.

To what courts and persons, and in what form, in civil suits, Griffith's Civ. P. C. Act XIV. of 1882, ss. 385, 386, Sch. IV. 156.

To what courts and persons, and in what form in criminal cases, Griffith's Crim. P. C. Act X. of 1882, ss. 503, 504.

Execution and return of, and effect of evidence recorded on in civil cases, Griffith's Civ. P. C. Act XIV. of 1882, ss. 388-390.*

Execution and return of, and effect of evidence recorded in criminal cases, Griffith's Crim. P. C. Act X. of 1882, s. 507.

Execution and return when issued by foreign Courts, Griffith's Civ. P. C. Act XIV. of 1882, s. 391; Act XXI. of 1879, s. 19; Act IV. of 1880, s. 2.

Costs where no personal appearance, Griffith's Civ. P. C. Act XIV. of 1882, s. 641.

Discovery of when ground for review of judgment, Griffith's Civ. P. C. Act XIV. of 1882, ss. 623-626.

On appeal, Griffith's Civ. P. C. Act XIV. of 1882, ss. 565-570.

Mandamus for examination of witnesses, 13 Geo. 3, c. 63, s. 40.

Settlement officers invested with powers of civil courts, in certain cases, Act XVIII. of 1881, ss. 33-38.

Duties and powers of, to be recorded in record of rights, Act XVIII. of 1881, ss. 68-78.

DOCUMENTS, Enforcing Production of—

Summons for, by whom issuable in criminal trials, Griffith's Crim. P. C. Act X. of 1882, ss. 94, 95.

Search warrant for, when and by whom issuable, Griffith's Crim. P. C. Act X. of 1882, ss. 96, 97, 165, 166.

By coroner, Act IV. of 1871, s. 17.

By order of civil court generally, Griffith's Civ. P. C. Act XIV. of 1882, ss. 129, 130.

By order of civil court on winding up company, Griffith's Companies C. Act VI. of 1882, s. 162.

By District Court of testamentary papers, Act X. of 1865, s. 237.

Before revenue officers, Bomb. Act V. of 1879, ss. 182-192; Mad. Act III. of 1869; Mad. Act VIII. of 1865, ss. 60-63; N. Act XIX. of 1873, ss. 208-210, 212; N. Act VIII. of 1879, s. 25; O. Act XVIII. of 1876, s. 217.

Before settlement officer, N. Act XIX. of 1873, s. 42; O. Act XVII. of 1878, s. 25.

Before commission for inquiry into conduct of public servants, Act XXXVII. of 1850, s. 8.

In partition proceedings, Ben. Act VIII. of 1876, s. 139.

In mutation proceedings, Ben. Act VIII. of 1876, s. 53.

In proceedings under Bengal Embankment Act, Ben. Act II. of 1882, s. 82.

In proceedings under Bengal Salt Laws Amendment, Ben. Act I. of 1882, s. 17.

In enquiries into agrarian disputes, Ben. Act VI. of 1876, s. 7.

In boundary cases and survey, Ben. Act V. of 1875, s. 50.

Investiture of forest officer with power of civil court, Act VII. of 1878, s. 71 b. ; Mad. Act V. of 1882, s. 9 b.

Before managers of encumbered estates, Bom. Act VI. of 1862, s. 14 ; Act XXIV. of 1870, s. 14 ; Act VI. of 1876, s. 14 ; Reg. IV. of 1872, s. 29 ; Acts XX. & XXI. of 1881, ss. 35 ; Act XVI. of 1882, ss. 30 & 9.

Party in civil suit, when entitled to inspection, Griffith's Civ. P. C. Act XIV. of 1882, s. 131.

Duty of party receiving notice to produce, Griffith's Civ. P. C. Act XIV. of 1882, s. 132.

Power of Court to compel compliance, Griffith's Civ. P. C. Act XIV. of 1882, ss. 133-135. See also sections 65, 66, 163, 164, of the present Act.

Persons bound to produce, need not attend personally, Griffith's Civ. P. C., ss. 164, 172. See also present Act, ss. 139, 162.

Persons in Court bound to produce those in possession, Griffith's Civ. P. C., s. 165.

Omission to produce, punishable, Act XIV. of 1860, s. 175.

Omission to produce, consequences, Griffith's Civ. P. C., s. 136.

Inadmissible if not produced with plaint, Griffith's Civ. P. C., ss. 59-63.

Inadmissible if not produced on notice, Act I. of 1872, s. 164.

Inadmissible if not produced at first hearing, Griffith's Civ. P. C. ss. 138, 139.

Destruction of, Griffith's Civ. P. C. s. 204.

Privilege of witness, Act I. of 1872, ss. 130, 131.

Procedure on production and filing : See Griffith's, edition of the Civil Procedure Code.

II. RECORD OF EVIDENCE.

(a) In civil suits.

In appealable cases, Act XVII. of 1875, s. 20, Griffith's Civ. P. C., ss. 181-187.

In non-appealable cases, Griffith's Civ. P. C., ss. 189-190.

When given in English, Griffith's Civ. P. C., s. 185.

In Chartered High Court, Griffith's Civ. P. C., ss. 633, 638.

By predecessor, power to judge to act on, Griffith's Civ. P. C., s. 191.

To contain notes on demeanour, Griffith's Civ. P. C., s. 188.

When to be taken before hearing, Griffith's Civ. P. C., s. 192.

Questions and answers, when to be taken down, Griffith's Civ. P. C., ss. 186, 187.

In Oudh, Act XVIII. of 1876, s. 19.

In Central Provinces, Act XX. of 1875, ss. 12 and 11; Act XVII. of 1879, s. 2.

In British Burma, Act XVII. of 1875, s. 91.

In Matrimonial Court, orally or by affidavit, Act IV. of 1869, s. 51.

By Privy Council, 3 & 4 Will. 4, c. 41, s. 7.

(b) In criminal cases.

To be taken in presence of accused, Griffith's Crim. P. C., ss. 353, 488.

By magistrates and courts of session, Griffith's Crim. P. C., ss. 354, 361.

By presidency magistrate, Griffith's Crim. P. C., s. 362.

By High Court under original jurisdiction, Griffith's Crim. P. C., s. 365.

By Appellate Court, Griffith's Crim. P. C., s. 428.

In maintenance proceedings, Griffith's Crim. P. C., s. 488.

Before commission, Griffith's *Crim. P. C.*, s. 503.

Keeping peace, Griffith's *Crim. P. C.*, s. 117.

On inquest, Griffith's *Crim. P. C.*, s. 176.

When given in English, Griffith's *Crim. P. C.*, s. 356.

To contain notes of demeanour, Griffith's *Crim. P. C.*, s. 363.

Interpretation of, to accused or his pleader, Griffith's *Crim. P. C.*, ss. 360, 361.

Taking constitutes judicial proceeding, Griffith's *Crim. P. C.*, s. 401.

Not required in summary trial, Griffith's *Crim. P. C.*, ss. 263, 354.

As to fugitive offenders, see 44 & 45 *Vict. c. 69.*

(c) By revenue officers, Act VII. of 1878, s. 71, d ;
Act XIX. of 1873, ss. 215-219.

III. Admission and Rejection of Evidence is mainly regulated by the present Act.

The Amending Act, XVIII. of 1872, s. 12, re-enacted section 12 of Act XV. of 1852, which empowered judges, justices, officers, commissioners, arbitrators, and other persons to administer oaths ; but was repealed by the Indian Oaths Act, 1873.

3. In this Act the following words and expressions are Interpretation used in the following senses, unless a contrary intention clause.
appears from the context:—

“ Court ” includes all Judges and Magistrates, and all “ Court.” persons, except arbitrators, legally authorized to take evidence.

“ Fact ” means and includes—

(1) Any thing, state of things, or relation of things, “ Fact.” capable of being perceived by the senses ;

(2) Any mental condition of which any person is conscious.

Illustrations.

(a.) That there are certain objects arranged in a certain-order in a certain place, is a fact.

(b.) That a man heard or saw something, is a fact.

(c.) That a man said certain words, is a fact.

(d.) That a man holds a certain opinion, has a certain intention, acts in good faith, or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation, is a fact.

(e.) That a man has a certain reputation, is a fact.

“ Relevant.”

One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts.

“ Facts in issue.”

The expression “Facts in issue” means and includes—

Any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature, or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows.

Explanation.—Whenever, under the provisions of the law for the time being in force relating to Civil Procedure, any Court records an issue of fact, the fact to be asserted or denied in the answer to such issue, is a fact in issue.

Illustrations.

A. is accused of the murder of B.

At his trial the following facts may be in issue:—

That A. caused B.'s death ;

That A. intended to cause B.'s death ;

That A. had received grave and sudden provocation from B. ;

That A. at the time of doing the act which caused B.'s death, was, by reason of unsoundness of mind, incapable of knowing its nature.

“ Document.”

“Document” means any matter expressed or described

upon any substance by means of letters, figures, or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

Illustrations.

A writing is a document :

Words printed, lithographed, or photographed, are documents :

A map or plan is a document :

An inscription on a metal plate or stone is a document :

A caricature is a document.

“Evidence” means and includes—

“Evidence.”

(1) All statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry ;

Such statements are called oral evidence :

(2) All documents produced for the inspection of the Court ; such documents are called documentary evidence.

A fact is said to be proved when, after considering the “Proved.” matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

A fact is said to be disproved when, after considering “Disproved.” the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

A fact is said not to be proved when it is neither proved “Not proved.” nor disproved.

Court.—Respecting Courts and their powers, see Griffith’s Civil and Criminal Procedure Codes, *passim*.

The general effect of the charters of the Supreme Courts in respect of jurisdiction is as follows :—

The Courts had jurisdiction in all actions arising in the Presidency against any subject residing therein upon any contract in writing with a British subject when the cause of action exceeded 500 rupees, and it had been agreed that the matter should be determined by the Court; but not against persons never resident there or then resident in Great Britain or Ireland, unless the action was commenced within two years after the cause of action arose and the sum to be recovered was not of greater value than 30,000 rupees.

24 & 25 Vict. c. 104, s. 11, made existing provisions applicable to the High Courts.

Limitation Act XV. of 1877 limited actions on judgments of British India to twelve years, on foreign judgments, to six.

Act XXII. of 1869 of the Indian Legislature, whereby the jurisdiction of the High Court is excluded from certain districts, is not inconsistent with the Indian High Courts Act (24 & 25 Vict. c. 104) or with the charter of the High Court, and is in its general scope within the legislative power of the Governor-General in Council: *R. v. Burah* (3 App. Cas. 889). Section 9, which confers on the Lieutenant-Governor of Bengal the power to apply it to a certain district, is conditional legislation, not a delegation of legislative power: S. C.

Relevant.—Four classes of facts which in common life would usually be regarded as relevant to prove,

are excluded from it by the law of evidence except in certain cases.

(1.) Facts similar to but not specifically connected with each other (*res inter alios actæ*).

(2.) The fact that a person not called as a witness has asserted the existence of a fact in issue or relevant thereto.

(3.) The fact that any person is of opinion that a fact exists.

(4.) The fact that a person's character is such as to render conduct imputed to him probable or improbable.

To each of these four exclusive rules there are important exceptions defined by this Act: Stephen's Digest, XIII.

"Facts in issues." Section 225 of the Criminal Procedure Code, 1882, provides that: "No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence on those particulars shall be regarded at any stage of the case as material unless the accused was misled by such error or omission." Sections 226-229 provide for proceeding without a charge or with an imperfect one, give the Court power to alter charge, to try at once or suspend or grant a new trial. Under section 236 where the description of the offence committed is doubtful, the indictment may contain cumulative or alternative charges. By virtue of section 237 a person charged with one offence may be convicted of another. And section 238 authorises

a conviction for a minor offence of one charged with a greater offence only. The Civil Procedure Code, section 149, enables the Court to, "any time before passing a decree, amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the controversy between the parties shall be so made or framed." "The Court may also at any time before passing a decree strike out any issues that appear to it to be wrongly framed or introduced."

"By the term evidence, considered according to the most extended application that is ever given to it, may be and in general seems to be understood, any matter of fact the effect, tendency or design of which when presented to the mind is to produce a persuasion concerning the existence of some other matter of fact ; a persuasion either affirmative or disaffirmative of its existence": Bentham's *Rationale of Judicial Evidence*, b. 1., ch. 1.

Evidence.—Probable evidence is essentially distinguished from demonstrative by this—that it admits of degrees and of all varieties of them from the highest moral certainty to the very lowest presumption. We cannot, indeed, say a thing is probably true upon one very slight presumption for it: because as there may be probabilities on both sides of a question there may be some against it, and though there be a slight presumption it does not yet beget that degree of conviction which is implied in saying a thing is probably true.

A sub-registrar is by virtue of section 82 of the Registration Act a public officer, and proceedings before him are judicial proceedings within section 228 of the Penal Code, and he being legally authorised to take evidence, is a court within the present section: *I. M. P. S. Lal*, 13 B. L. R. Appen. 40. A decree though barred by the Statute of Limitations is a document admissible against the defendant to prove the rent that he was liable to pay: *M. B. Bahadoor v. R. Shaw*, 14 B. L. R. 370. *Seemle*, it would not be admissible in a subsequent suit to shew that the defendant had not been in bonâ fide receipt of the rent during a period subsequent to the decree: *S. V.* p. 371, note (1).

The definition of "court" being incorporated into the Oaths Act (X. of 1873), s. 8, an arbitrator cannot administer an oath. Whether the consent of the parties to an arbitration will remove this incapacity is doubtful: *Wali-ul-la v. G. Ali*, I. L. R. 1 A. S. 535.

A registering officer of powers of attorney is a court within the section: *K. N. Koondoo v. Brown*, I. L. R. 14 C. S. 176.

Where the question was whether commission was due to a house-agent on the sale of a house through his agency the purchaser was allowed to be asked whether he thought he should have bought the property if he had not obtained a card to view it from the agent's office: *Mansell v. Clements*, L. R. 9 C. P. 139.

In the absence of special agreement a judgment or

an award against a principal debtor is not binding on the surety, and is not evidence against him if he be sued by the creditors : *E. P. Young*, L. R. 17 Ch. D. 668.

“ May presume.”

4. Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it :

“ Shall presume.”

Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved :

“ Conclusive proof.”

When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

There are numerous statutory rules as to presumptions which may be distributed as follows under six heads :—

- (1.) As to genuineness and validity of certain documents, signatures, proceedings, &c.
- (2.) As to ownership.
- (3.) In respect of offences.
- (4.) From course of former suits.
- (5.) In matters arising between landlord and tenant.
- (6.) Miscellaneous.

(1.) See sections 20, 67, 69, 79, 80, 81–85, 87 and 88, 89 and 90 of the present Act. A copy of decree with certificate sent to other Court for execution is provided for by Griffith's Civil Procedure Code, Act XIV. of 1882, s. 225. As to acknowledgment by married woman,

see Act XXXI. of 1854, s. 11; correctness of record of survey or settlement of forest or waste land, Act VII. of 1878, s. 28; competency of Court making foreign judgment, Griffith's Civil Procedure Code, Act XIV. of 1882, s. 13, Ex. VI.; proceedings of registered company, Griffith's Companies Act, VI. of 1882, s. 92.

(2.) As to ownership of person in possession, see section 110; of forests, waste lands, quarries, included within boundaries of settled estates, P. Act, XXXIII. of 1871, ss. 26, 28; as to drift, stranded and unmarked timber being the property of Government, Act VII. of 1878, s. 45; as to forest produce seized in connection with offence, S. A. s. 68; Ben. Act XIX. of 1881, s. 67.

(3.) In respect of offences, see sections 105 & 111 of this Act; as to desertion by soldiers, Act V. of 1869, Art. 114; person found in gaming-house, Act XLVIII. of 1860, s. 15, &c.; from possession of opium, Act I. of 1878, s. 10; from second conviction for sale of illicit spirits, Act III. of 1880, s. 15, &c.

(4.) From course of former suits as to acquiescing in jurisdiction, Griffith's Code of Civil Procedure, Act XIV. of 1882, s. 20; omission of matter of attack or defence, s. 13, Ex. II.; refusal of relief, section 13, Ex. III.

(5.) In matters between landlord and tenant a presumption arises from raiyats and undertenants being at fixed rates from time of permanent settlement: Act X., 1859, ss. 4, 16; XII. of 1881, s. 6; Ben. Act VIII. of 1869, ss. 4, 17. As to duration and nature of tenancy,

see Bom. Act V. of 1879, s. 83; right of occupancy from entry in settlement record, P. Act, XXVIII. of 1868, s. 6; Hazára Reg. III. of 1873, s. 6; tenants of istimrárdás being tenants at will, Aj. Reg. II. of 1877, s. 21.

(6.) For certain miscellaneous presumptions, see sections 114, 79, 82, 91, exc. 1, 107, 108, 109, 114 h, 148 (4) of this Act; as to pledges and subsequent advance, Act IX. of 1872, s. 174; right of government to levy land revenue, Bom. Act II. of 1863, s. 10; Act VII. of 1863, s. 14; compensation for breach of contract to transfer, Act 1 of 1877, s. 12 exp.; inadequacy of consideration, Act IV. of 1882, s. 53; right of agent to enforce contracts, Act IX. of 1872, s. 230; election of property, Act X. of 1865, s. 174: Act IV. of 1882, s. 35; domicile, Act X. of 1865, s. 19; marriage of native converts, Act XXI. of 1866, s. 21; negotiable instruments, Act XXVI. of 1881, ss. 118, 119, 137; refusal of accused to answer question, Griffith's Criminal Procedure Code, Act X. of 1882, s. 342. For certain statutory rules making pieces of evidence conclusive, see Chapter VIII., title Estoppel.

There is no safer rule for investigating cases of conflicting evidence, where perjury and fraud must exist on the one side or the other, than to consider what facts are beyond dispute, and to examine which of the two cases best accords with those facts according to the ordinary course of human affairs and the usual habits of life: *Usudoollah v. Imaman*, 1 Moore's I. A. 19.

CHAPTER II.

ON THE RELEVANCY OF FACTS.

LAYING aside the consideration of conclusive presumptions and the many pre-appointed rules under certain statutes for the establishment of particular facts, we may say that general rules of evidence are not a measure supplied to a judge whereby he is to determine whether a particular fact is proved or not. They are rather designed with the object of excluding evidence. For ordinary evidence is of infinite degrees, and even the slightest fact or testimony may have some value. Nevertheless, if a judge were to take into account everything that could by possibility affect his judgment, litigation might be protracted almost without end. It has been well remarked, *Interest reipublicæ ut sit finis litium*, 6 Coke's Reports 9, *Marriot v. Hampton* (7 Term Rep. 269). But see Bentham's Introduction and Chapter IX.

“A balance must be struck between a consideration of the worth of evidence and of its cost. Evidence may be so slight as not to be worth the trouble or expense of bringing it forward. An instance is the rule that requires evidence to be produced at once or within a specified time. After that time has elapsed,

new evidence may be discovered such that if produced in time it would have seriously affected the opinion of the judge. But a controversy cannot be kept open for ever, and it is better on the whole that a judge should occasionally be led wrong by an insufficiency of evidence than that controversies should never be ended" (*Roman Law* by Hunter, p. 1051). Logically viewed, character for example is apparently always relevant, but experience shews the contrary; for characters change. And even those characters which seem perfect possess human infirmities, and in this transitory state are exposed to overpowering temptations. One of the great masters of criminal law made the observation that no rank or elevation in life, no uprightness of heart, no prudence nor circumspection of conduct should tempt a man to conclude that he may not some time or other be deeply interested in that branch of law: Foster, Preface to Reports. To which observation Sir William Blackstone appended the remark, "The infirmities of the best among us, the vices and ungovernable passions of others, and the numberless unforeseen events which the compass of a day may bring forth will teach us upon a moment's reflection that to know with precision what the laws of our country have forbidden, and the deplorable consequences to which a wilful disobedience may expose us, is a matter of *universal* concern."

• But we must not suppose that all general rules exist for the purpose of excluding evidence. Those who have most deeply studied the science, or practised the

art of judicial evidence, will admit that many of its principles primarily tend to the securing of truth in the witnesses, and impartiality in the administrators of justice, whose labours are also lightened by the aid those principles afford in estimating the value of testimony. Mr. Bentham, in his prospective view of a work which has commended itself to French as well as English jurists, shows this by his summary of his *Rationale of Judicial Evidence*. "The results," he says, "may be comprised in three propositions: the one a theorem to be proved; the others two problems to be solved. The theorem is this: that merely with a view to rectitude of decision, to the avoidance of the mischiefs attached to undue decision, no species of evidence whatsoever, willing or unwilling, ought to be excluded: for that although in certain cases it may be right that this or that lot of evidence, though tendered, should not be admitted, yet in these cases the reason for exclusion rests on other grounds: viz. avoidance of vexation, expense and delay. The proof of this theorem constitutes the first of the three main results."

"To give instructions pointing out the means by which what can be done may be done towards securing the truth of evidence; this is one of the two main problems, the solution of which is attempted. The solution of it is the second of the three main results."

"To give instructions serving to assist the mind of the judge in forming its estimate of the probability of truth in the instance of the evidence presented to

it, in a word, in judging of the weight of evidence; this is the other of the two main problems."

For the legal interpretation of relevancy consult section 3. The following definition taken from Stephen's Digest is useful as a *memoria technica*. "The word means that any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other."

In cases tried by a jury "it is the duty of the judge to decide all questions of law arising in the course of the trial, and especially all questions as to the relevancy of facts which it is proposed to prove, and the admissibility of evidence or the propriety of questions asked by or on behalf of the parties, and in his discretion to prevent the production of inadmissible evidence, whether it is or is not objected to by the parties; also to decide upon the meaning and construction of all documents given in evidence at the trial; also to decide upon all matters of fact which it may be necessary to prove in order to enable evidence of particular matters to be given; also to decide whether any question which arises is for himself or for the jury, and upon this point his decision shall bind the jurors" (Griffith's Crim. P. C. s. 298; Civ. P. C. s. 140, s. 2).

It is the duty of the judge to explain the law to the jury, and to tell them what offence the facts would

prove against the prisoner if they believed them, and it is then for the jury to say, whether, within the definition given by the judge, the facts as proved constitute the offence.

5. Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue, and of such other facts as are hereinafter declared to be relevant and of no others. Evidence may be given of facts in issue and relevant facts.

Explanation.—This section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to Civil Procedure.

Illustrations.

(a.) A. is tried for the murder of B. by beating him with a club with the intention of causing his death.

At A.'s trial the following facts are in issue :—

A.'s beating B. with the club ;

A.'s causing B.'s death by such beating ;

A.'s intention to cause B.'s death.

(b.) A suitor does not bring with him, and have in readiness for production at the first hearing of the case, a bond on which he relies. This section does not enable him to produce the bond or prove its contents at a subsequent stage of the proceedings, otherwise than in accordance with the conditions prescribed by the Code of Civil Procedure.

“Evidence.”—For the legal interpretation of the word see section 3. Such interpretation, however, is too elementary, for it does not include statements and admissions made out of Court by the parties, their conduct and demeanour before the Court, and circumstances coming under the direct cognisance of the Court, and having a material bearing on the questions

in issue. It omits the absence of producible witnesses or other evidence (see section 114, ill. (g)) and the destruction or fabrication of evidence. *Omnia præsumuntur contra spoliatores: Armory v. Delamirie*, (1 Strahan, 504). See also speech of Sir Samuel Romilly, 29 State Trials, 1193, and section 8 (e).

Finally, it does not include the material evidence referred to or mentioned in Griffith's Civ. P. C. ss. 167, 167, 264, nor that in Griffith's Crim. P. C. ss. 218, 293.

It also fails to notice the different species of evidence called direct (see s. 60), primary (see ss. 62, 64, 165), and secondary (see ss. 63, 65, 66).

The answers of a bankrupt on his public examination are not admissible in evidence in proceedings in the same bankruptcy by the trustee against parties other than the bankrupt: *E. P. Board of Trade* (19 Q. B. D. 572).

Where the evidence at the trial is in part disbelieved as to which part it is thought that the witnesses have committed perjury, it is unsafe to accept the evidence of those witnesses in other parts and to convict the prisoner thereunder: *J. Singh v. Q. E.* (I. L. R. 14 C. S. 164).

All preliminary facts which are necessary to establish the admissibility of evidence must be proved *aliunde* before such evidence is received: *Phillips v. Cole* (10, A. & E. 106; 2 P. & D. 288).

"Civil Procedure," see Act XIV. of 1882, Griffith's edition, ss. 59, 63, 138, 139.

6. Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

Relevancy of facts forming part of same transaction.

Illustrations.

(a.) A. is accused of the murder of B. by beating him. Whatever was said or done by A. or B. or the bystanders at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.

(b.) A. is accused of waging war against the Queen by taking part in an armed insurrection in which property is destroyed, troops are attacked, and gaols are broken open. The occurrence of these facts is relevant, as forming part of the general transaction, though A. may not have been present at all of them.

(c.) A. sues B. for a libel contained in a letter forming part of a correspondence. Letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is contained, are relevant facts, though they do not contain the libel itself.

(d.) The question is, whether certain goods ordered from B. were delivered to A. The goods were delivered to several intermediate persons successively. Each delivery is a relevant fact.

The laws of evidence as to what is receivable or not are founded upon a compound consideration of what is abstractedly considered is calculated to throw light on the subject in dispute and of what is practicable. Perhaps if we lived to the age of a thousand years instead of sixty or seventy, it might throw light on any subject that came into dispute, if all matters which could by possibility affect it were severally gone into and inquiries carried on from month to month as to the truth of everything connected with it. I do not say how that would be, but such a course

is found to be impossible at present. Rolfe, B. (Cranworth, L.C.): *Alf v. Hitchcock* (11 Jur. 482).

(b) It was held by a majority of the Court on Hardy's trial that a letter written by a party to a conspiracy and relating to it was admissible in evidence to show the nature and object of the conspiracy against a person charged with being connected with it (24 S. T. 473).

(c) In Judge Johnson's case it was discussed whether the receipt of a letter in the handwriting of the defendant in the county of Middlesex and bearing the Dublin postmark is sufficient evidence to charge the defendant with a publication in Middlesex without proof of its actual transmission from Dublin (29 S. T. 448).

Selling a libel by a servant in a shop is presumptive evidence of its publication by the master (20 S. T. 838, 839).

In an action for libel, evidence that the paper was sold to other persons and at other times than those mentioned on the declaration is admissible to prove that the libel was published deliberately and in the ordinary course of business, and not accidentally or by mistake: *Plunkett v. Cobbett* (29 S. T. 69 note).

Statement may be relevant to cause of action (6 C. & P. 325).

Adjacency of estate whether in bed of river or close to road is relevant (2 M. & W. 326; 7 Bing. 332).

A statement taken down in the course of a police investigation by a police constable under C. P. C.,

s. 162, is not evidence at any stage of a judicial proceeding: *Q. E. v. I. V. Fatarn* (I. L. R. 11 B. S. 659).

7. Facts which are the occasion, cause, or effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.

Facts which are occasion, cause, or effect of facts in issue.

Illustrations.

(a.) The question is, whether A. robbed B.

The facts that, shortly before the robbery, B. went to a fair with money in his possession, and that he showed it, or mentioned the fact that he had it, to third persons, are relevant.

(b.) The question is, whether A. murdered B.

Marks on the ground, produced by a struggle at or near the place where the murder was committed, are relevant facts.

(c.) The question is, whether A. poisoned B.

The state of B.'s health before the symptoms ascribed to poison, and habits of B., known to A., which afforded an opportunity for the administration of poison, are relevant facts.

8. Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

Motive, preparation and previous or subsequent conduct.

The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person, an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

Explanation 1.—The word “conduct” in this section does not include statements, unless those statements accompany and explain acts other than statements; but

this explanation is not to affect the relevancy of statements under any other section of this Act.

Explanation 2.—When the conduct of any person is relevant, any statement made to him, or in his presence and hearing, which affects such conduct, is relevant.

Illustrations.

(a.) A. is tried for the murder of B.

The fact that A. murdered C., that B. knew that A. had murdered C., and that B. had tried to extort money from A. by threatening to make his knowledge public, are relevant.

(b.) A. sues B. upon a bond for the payment of money. B. denies the making of the bond.

The fact that, at the time when the bond was alleged to be made, B. required money for a particular purpose, is relevant.

(c.) A. is tried for the murder of B. by poison.

The fact that, before the death of B., A. procured poison similar to that which was administered to B., is relevant.

(d.) The question is, whether a certain document is the will of A.

The facts that, not long before the date of the alleged will, A. made inquiry into matters to which the provisions of the alleged will relate; that he consulted vakils in reference to making the will, and that he caused drafts of other wills to be prepared, of which he did not approve, are relevant.

(e.) A. is accused of a crime.

The facts that, either before, or at the time of, or after the alleged crime, A. provided evidence which would tend to give to the facts of the case an appearance favourable to himself, or that he destroyed or concealed evidence, or prevented the presence or procured the absence of persons who might have been witnesses, or suborned persons to give false evidence respecting it, are relevant.

(f.) The question is, whether A. robbed B.

The facts that, after B. was robbed, C. said in A.'s presence: "The police are coming to look for the man who robbed B.," and that immediately afterwards A. ran away, are relevant.

(g.) The question is, whether A. owes B. rupees 10,000.

The facts that A. asked C. to lend him money, and that D. said to C. in A.'s presence and hearing: "I advise you not to trust A.,

for he owes B. 10,000 rupees," and that A. went away without making any answer, are relevant facts.

(h.) The question is, whether A. committed a crime.

The fact that A. absconded after receiving a letter warning him that inquiry was being made for the criminal, and the contents of the letter, are relevant.

(i.) A. is accused of a crime.

The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, are relevant.

(j.) The question is, whether A. was ravished.

The fact that, shortly after the alleged rape she made a complaint relating to the crime, the circumstances under which, and the terms in which, the complaint was made, are relevant.

The fact that, without making a complaint, she said that she had been ravished, is not relevant as conduct under this section, though it may be relevant—

As a dying declaration under section thirty-two, clause (one), or

As corroborative evidence under section one hundred and fifty-seven.

(k.) The question is, whether A. was robbed.

The fact that, soon after the alleged robbery, he made a complaint relating to the offence, the circumstances under which, and the terms in which, the complaint was made, are relevant.

The fact that he said he had been robbed, without making any complaint, is not relevant as conduct under this section, though it may be relevant—

As a dying declaration under section thirty-two, clause (one), or

As corroborative evidence under section one hundred and fifty-seven.

(j) On the trial of an indictment charging an assault with intent to rape, if the prosecutrix in cross-examination denies having voluntarily had connection with the prisoner prior to the assault evidence to contradict her by proving such prior connection is admissible on his behalf: *R. v. Riley* (18 Q. B. D. 481; 16 Cox's C. C. 191).

In Watson's case evidence of seditious speeches by the prisoner, though they were not set out in the instrument of accusation, was admitted : 32 S. T. 87.

Facts necessary to explain or introduce relevant facts.

9. Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of any thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant, in so far as they are necessary for that purpose.

Illustrations.

(a.) The question is, whether a given document is the will of A. The state of A.'s property and of his family at the date of the alleged will may be relevant facts.

(b.) A. sues B. for a libel imputing disgraceful conduct to A.; B. affirms that the matter alleged to be libellous is true.

The position and relations of the parties at the time when the libel was published may be relevant facts as introductory to the facts in issue.

The particulars of a dispute between A. and B. about a matter unconnected with the alleged libel are irrelevant, though the fact that there was a dispute may be relevant if it affected the relations between A. and B.

(c.) A. is accused of a crime.

The fact that, soon after the commission of the crime, A. absconded from his house, is relevant, under section eight, as conduct subsequent to and affected by facts in issue.

The fact that, at the time when he left home, he had sudden and urgent business at the place to which he went, is relevant, as tending to explain the fact that he left home suddenly.

The details of the business on which he left are not relevant, except in so far as they are necessary to show that the business was sudden and urgent.

(d.) A. sues B. for inducing C. to break a contract of service

made by him with A. C., on leaving A.'s service, says to A.: "I am leaving you because B. has made me a better offer." This statement is a relevant fact as explanatory of C.'s conduct, which is relevant as a fact in issue.

(e.) A., accused of theft, is seen to give the stolen property to B., who is seen to give it to A.'s wife. B. says, as he delivers it: "A says you are to hide this." B.'s statement is relevant, as explanatory of a fact which is part of the transaction.

(f.) A. is tried for a riot, and is proved to have marched at the head of a mob. The cries of the mob are relevant, as explanatory of the nature of the transaction.

The only evidence against a person charged with having caused grievous hurt voluntarily was a statement, made in the presence of the prisoner by the person injured to a third person immediately after the commission of the offence. The prisoner did not when the statement was made deny the act complained of. Such evidence is admissible under this section, also under section 8 (7): *I. M. P. S. Dhobni* (I. L. R. 10 C. S. 302).

In a suit for the enhancement of rent, persons of the cultivating class may be called to state from memory that during the preceding years the prices prevailing in the locality had increased, and so to prove that the value of the produce had increased: *H. P. Roy. W. Debee* (I. L. R. 7 C. S. 263).

A conspiracy to suborn false witnesses is relevant in an action of damages for an accident (L. R. 5 Q. B. 314).

In domicile and lunacy cases an inquiry as to the state of mind, sentiments, intentions, or opinions of a person at any particular period, his contemporaneous

declarations are admissible as part of the *res gestæ*, though evidence of this nature is seldom entitled to much weight: *Doucet v. Geoghegan* (9 Ch. D. 457).

Things said
or done by
conspirator in
reference to
common
design.

10. Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

Illustration.

Reasonable ground exists for believing that A. has joined in a conspiracy to wage war against the Queen.

The facts that B. procured arms in Europe for the purpose of the conspiracy, C. collected money in Calcutta for a like object, D. persuaded persons to join the conspiracy in Bombay, E. published writings advocating the object in view at Agra, and F. transmitted from Delhi to G. at Cabul the money which C. had collected at Calcutta, and the contents of a letter written by H. giving an account of the conspiracy, are each relevant, both to prove the existence of the conspiracy, and to prove A.'s complicity in it, although he may have been ignorant of all of them, and although the persons by whom they were done were strangers to him, and although they may have taken place before he joined the conspiracy or after he left it.

In all cases of general conspiracy where many agents are employed, the acts of the agents may be given in evidence against a party to the conspiracy in order to show its nature and objects: *Eyre, C.J., Horne Tooke's Trial* (25 S. T. 127).

On a prosecution for high treason in sending intelligence to the enemy, a letter sent by one prisoner in pursuance of a common design is evidence against all engaged in the same conspiracy: *Stone's Case* (25 S. T. 1268).

The fact that one of several parties to a conspiracy brings a letter to the printer to be printed is evidence against the others to prove a circumstance in the conspiracy, but not to affect the latter with the criminality of publishing the letter: *Hardy's Case* (24 S. T. 463).

It was doubted by the Court, in *Watson's case*, whether papers found in the possession of a party to a conspiracy might not be given in evidence against a person charged with participating in it in order to show the object of the conspiracy without express evidence that the papers were to be used in furtherance of the design (32 S. T. 360).

By the civil law the *corpus delicti* must be proved by positive testimony before evidence can be admitted to ascertain the offender (14 S. T. 1229, 1246). This subject was discussed on the trial of Captain Green and others for piracy and murder: S. C.

Declarations or conversations of the defendant on a speculative subject connected with criminal acts charged against him are evidence to show that his general opinions upon that subject are inconsistent with a criminal intention in the acts upon which the charge is founded: *Hardy's Case* (24 S. T. 1094).

There is no rule of law in England that in cases of

treason the overt act must be proved by two witnesses before evidence of a confession is admissible: *Crossfield's Case* (26 S. T. 57).

"In the cases of Hardy, Horne Tooke, and other persons, the acts of different associations were given in evidence and their resolutions at meetings at which neither Hardy nor Horne Tooke attended. But they were given in evidence to be followed by other evidence showing a connection with these societies." Holroyd, J.: *Redford v. Birley*. The allegation being (1) the existence of a conspiracy to sow discontent amongst the king's subjects, and to excite hatred of the constitution; (2) the holding of a meeting in Manchester in furtherance of the conspiracy. Resolutions read at a meeting held out of Manchester were admitted (S. C. 1 S. T. N. S. 1193).

"If what people were doing was lawful, the act of one is not the act of another; or even if it was unlawful unless it was in execution of a common purpose" (S. C. S. V. 1104).

The question was whether A. and B. conspired to pass goods through Custom House for too small a duty. Though a false entry by A. in a book necessary to carry out the fraud is relevant against B., it was held that an entry by A. on the counterfoil of his cheque-book showing proceeds of fraud with B. was not relevant as against B.: *R. v. Blake* (O. Q. B. 137-140).

When facts
not otherwise
relevant
become
relevant.

11. Facts not otherwise relevant are relevant—
(1) If they are inconsistent with any fact in issue or relevant fact;

(2) If by themselves, or in connection with other facts, they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

Illustrations.

(a.) The question is, whether A. committed a crime at Calcutta on a certain day.

The fact that, on that day, A. was at Lahore is relevant.

The fact that, near the time when the crime was committed, A. was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant.

(b.) The question is whether A. committed a crime.

The circumstances are such that the crime must have been committed either by A., B., C. or D. Every fact which shows that the crime could have been committed by no one else, and that it was not committed by either B., C., or D., is relevant.

This section is limited in effect by section 54. So construed, it renders inadmissible one crime not reduced to certainty by a legal conviction to prove the existence of another unconnected crime, even though cognate. Accordingly, the possession of a number of documents supposed to be forged is no evidence to prove the forgery of a document with which the possessor is charged : *R. v. Parbhuda's* (11 B. H. C. R. 90).

In a suit between A. and B. the question was whether C. or D. was heir of H. If C., then A. was entitled to succeed, otherwise not. The same question had been raised in a former suit by X. against A., and decided against A. The former judgment is not admissible against A. under any section of the Act : *G. Lall v. F. Lall* (I. L. R. 6 C. S. 171).

12. In suits in which damages are claimed, any fact In suits for
damages, facts

tending to enable Court to determine amount are relevant.

Facts relevant when right or custom is in question.

which will enable the Court to determine the amount of damages which ought to be awarded is relevant.

13. Where the question is as to the existence of any right or custom, the following facts are relevant—

(a.) Any transaction by which the right or custom in question was created, claimed, modified, recognised, asserted, or denied, or which was inconsistent with its existence;

(b.) Particular instances in which the right or custom was claimed, recognised, or exercised, or in which its exercise was disputed, asserted, or departed from.

Illustration.

The question is whether A. has a right to a fishery. A deed conferring the fishery on A.'s ancestors, a mortgage of the fishery by A.'s father, a subsequent grant of the fishery by A.'s father, irreconcilable with the mortgage, particular instances in which A.'s father exercised the right, or in which the exercise of the right was stopped by A.'s neighbours, are relevant facts: •

A deed executed by a considerable majority of a family is admissible in evidence of a family custom recited therein. But such custom as against a defendant who did not execute must be proved *aliunde*: *H. Mullick v. N. Mullick* (10 B. L. R. 263).

A map prepared by an officer of Government while in charge of a khas mehal, Government being in possession of the mehal merely as a private proprietor, it is not a map purporting to have been made under the authority of the Government within section 83 of the Indian Evidence Act (1 of 1872), the accuracy of which is to be presumed; but such a map may be admitted as evidence under this section: *J. Mullick v. D. Mytee* (I. L. R. 5 C. S. 287).

See *N. Parshad v. G. Singh*, cited in note to section 49.

In a suit for rent the amount of land held by the defendant was questioned, and it was contended that the land must be measured with a hath of 21½ inches and not one of 18 as claimed by the plaintiff zemindar. Certain decrees obtained by the zemindar against other tenants in the same pergunnah in suits in which a hath of 18 inches was used were tendered in evidence to shew what was the customary hath. *Held*, that such decrees were admissible in evidence: *J. Sirdar v. R. K. Roy* (I. L. R. 15 C. S. 233).

The multiform evidence of an adoption was considered in *Subramanyam v. Paramasivaran* (I. L. R. 11 M. S. 116).

Judgments and decrees recognising rights between parties to a suit, or between persons whom they represent, although not conclusive under this Act as they were before it came into operation, are yet admissible under this section, even if the parties in the former suit be entire strangers. Where the parties are the same or representatives of those in the former suit, such judgments and decrees may be evidence so nearly conclusive as to shift the burden of proof from the party producing them as in his favour to his opponent: *N. Bhikhabhai v. Dipaumed* (I. L. R. 3 B. S. 3). Section 13 of the Civil Procedure Code, 1882, relates to the conclusiveness of judgments and other *res judicatæ*, and is as follows: "No Court shall try any suit or issue in which the matter directly and

substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title in a court of jurisdiction competent to try such subsequent suit, or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court. Explanation I. The matter above referred to must in the former suit have been alleged by one party, and either denied or admitted expressly or impliedly by the other. Explanation II. Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. Explanation III. Any relief claimed in the plaint which is not expressly granted by the decree shall, for the purpose of this section, be deemed to have been refused. Explanation IV. A decision is final within the meaning of this section when it is such as the Court making it could not alter (except on review) on the application of either party, or reconsider of its own motion. A decision liable to appeal may be final within the meaning of this section until the appeal is made. Explanation V. Where persons litigate *bonâ fide* in respect of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purpose of this section, be deemed to claim under the persons so litigating. Explanation VI. Where a foreign judgment is relied on, the production of the judgment duly

authenticated is presumptive evidence that the Court which made it had competent jurisdiction unless the contrary appear on the record ; but such presumption may be removed by proving the want of jurisdiction."

A mere statement of an alleged rent in an *ex parte* decree is not a *res judicata*: *M. S. Mundul v. Brae* (I. L. R. 16 C. S. 300).

Judgments in suits in which a right was asserted to collect dues to a temple are relevant in a suit for the same purpose against other persons: *Ramasami v. Appaya* (I. L. R. 12 M. S. 9).

(b) A finding in a former suit in which the question was tried between all the parties to the subsequent suit is admissible in the latter though all the plaintiffs and defendants in the latter were co-defendants in the former ; *G. Koiburto v. B. Koiburto* (22 W. R. 457).

E. P. Powell v. T. R. Matthews (1 Ch. D. 501) is a recent case as to the evidence of a trade custom.

14. Facts showing the existence of any state of mind— Facts showing existence of state of mind, or of body or bodily feeling—such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling—are relevant, when the existence of any such state of mind or body, or bodily feeling, is in issue or relevant.

Explanation.—A fact relevant, as showing the existence of a relevant state of mind, must show that it exists, not generally, but in reference to the particular matter in question.

Illustrations.

(a.) A. is accused of receiving stolen goods, knowing them to be stolen. It is proved that he was in possession of a particular stolen article.

The fact that at the same time, he was in possession of many other stolen articles is relevant, as tending to show that he knew each and all of the articles of which he was in possession to be stolen.

(b.) A. is accused of fraudulently delivering to another person a piece of counterfeit coin which, at the time when he delivered it, he knew to be counterfeit.

The fact that, at the time of its delivery, A. was possessed of a number of other pieces of counterfeit coin, is relevant.

(c.) A. sues B. for damage done by a dog of B.'s, which B. knew to be ferocious.

The facts that the dog had previously bitten X., Y., and Z., and that they had made complaints to B., are relevant.

(d.) The question is, whether A., the acceptor of a bill of exchange, knew that the name of the payee was fictitious.

The fact that A. had accepted other bills drawn in the same manner before they could have been transmitted to him by the payee, if the payee had been a real person, is relevant, as showing that A. knew that the payee was a fictitious person.

(e.) A. is accused of defaming B. by publishing an imputation intended to harm the reputation of B.

The fact of previous publications by A. respecting B., showing ill-will on the part of A. towards B., is relevant, as proving A.'s intention to harm B.'s reputation by the particular publication in question.

The facts that there was no previous quarrel between A. and B., and that A. repeated the matter complained of as he heard it, are relevant, as showing that A. did not intend to harm the reputation of B.

(f.) A. is sued by B. for fraudulently representing to B. that C. was solvent, whereby B., being induced to trust C., who was insolvent, suffered loss.

The fact that, at the time when A. represented C. to be solvent, C. was supposed to be solvent by his neighbours and by persons dealing with him, is relevant, as showing that A. made the representation in good faith.

(g.) A. is sued by B. for the price of work done by B., upon a house of which A. is owner, by the order of C., a contractor.

A.'s defence is that B.'s contract was with C.

The fact that A. paid C. for the work in question is relevant, as proving that A. did, in good faith, make over to C. the manage-

ment of the work in question, so that C. was in a position to contract with B. on C.'s own account, and not as agent for A.

(h.) A. is accused of the dishonest misappropriation of property which he had found, and the question is whether, when he appropriated it, he believed in good faith that the real owner could not be found.

The fact that public notice of the loss of the property had been given in the place where A. was is relevant, as showing that A. did not in good faith believe that the real owner of the property could not be found.

The fact that A. knew, or had reason to believe, that the notice was given fraudulently by C., who had heard of the loss of the property and wished to set up a false claim to it, is relevant, as showing that the fact that A. knew of the notice did not disprove A.'s good faith.

(i.) A. is charged with shooting at B. with intent to kill him. In order to show A.'s intent, the fact of A.'s having previously shot at B. may be proved.

(j.) A. is charged with sending threatening letters to B. Threatening letters previously sent by A. to B. may be proved, as showing the intention of the letters.

(k.) The question is, whether A. has been guilty of cruelty towards B., his wife.

Expressions of their feeling towards each other, shortly before or after the alleged cruelty, are relevant facts.

(l.) The question is, whether A.'s death was caused by poison.

Statements made by A. during his illness as to his symptoms are relevant facts.

(m.) The question is, what was the state of A.'s health at the time when an assurance on his life was effected.

Statements made by A. as to the state of his health at or near the time in question are relevant facts.

(n.) A. sues B. for negligence in providing him with a carriage for hire not reasonably fit for use, whereby A. was injured.

The fact that B.'s attention was drawn on other occasions to the defect of that particular carriage is relevant.

The fact that B. was habitually negligent about the carriages which he let to hire is irrelevant.

(o.) A. is tried for the murder of B. by intentionally shooting him dead.

The fact that A. on other occasions shot at B. is relevant, as showing his intention to shoot B.

The fact that A. was in the habit of shooting at people with intent to murder them is irrelevant.

(p.) A. is tried for a crime.

The fact that he said something indicating an intention to commit that particular crime is relevant.

The fact that he said something indicating a general disposition to commit crimes of that class is irrelevant.

The general duty of an innkeeper to take proper care for the safety of his guests does not extend to every room in his house, at all hours of night or day ; but must be limited to those places into which guests may be reasonably supposed likely to go in a reasonable belief that they are entitled or invited so to do. A guest in an inn, the property of the respondent company, left his bed-room in the middle of the night to go to the water-closet. There were properly lighted and easily accessible water-closets in the same corridor, but he went into a dark service room, the door of which was not locked but shut, and fell down the unguarded well of a lift at the end of the room, and was killed. The service room was not lighted nor used at night, and visitors had no business there at any time. In an action brought by the personal representatives of the deceased :—*Held*, that there was no evidence on the part of respondents to go to the jury : *Walker v. Midland Railway Company* (51 J. P. 116 H. L. E.).

In an action for damages by collision it appeared that the defendant's vessel while in motion came into

collision with the plaintiff's vessel, which was at anchor:—*Held*, that the fact that the plaintiff's vessel at the time of collision was at anchor, and could be seen, was *prima facie* evidence of negligence on the part of the defendants, and that the burden of proof was then upon them to rebut the presumption of liability by showing either that the collision was occasioned by no fault on their part or that it was due to inevitable accident, or that it was solely the fault of a pilot who was on board their vessel by compulsion of law: *Clyde Navigation Co. v. Barclay. The Indus* (12 P. D. 46, 56 L. J. P. 83).

The accused was charged with having received illegal gratification from C. & Co. on three specific occasions in 1876. In 1876, 1877, and 1878, C. & Co. were doing business as commissariat contractors, and the accused were managers of the commissariat office:—*Held*, that similar but unconnected instances of receiving gratifications illegally from C. & Co. in 1877 and 1878 were not admissible: *E. v. M. J. V. Moodeliar* (I. L. R. 6 C. S. 655).

15. When there is a question whether an act was accidental or intentional, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant.

Facts bearing on question whether act was accidental or intentional.

Illustration.

(a.) A. is accused of burning down his house in order to obtain money for which it is insured.

The facts that A. lived in several houses successively, each of which he insured, in each of which a fire occurred, and after each of

which fires A. received payment from a different insurance office, are relevant, as tending to show that the fires were not accidental.

(b.) A. is employed to receive money from the debtors of B. It is A.'s duty to make entries in a book showing the amount received by him. He makes an entry showing that on a particular occasion he received less than he really did receive.

The question is, whether this false entry was accidental or intentional.

The facts that other entries made by A. in the same book are false, and that the false entry is in each case in favour of A., are relevant.

(c.) A. is accused of fraudulently delivering to B. a counterfeit rupee.

The question is, whether the delivery of the rupee was accidental.

The facts that, soon before or soon after the delivery to B., A. delivered counterfeit rupees to C., D., E., are relevant, as showing that the delivery to B. was not accidental.

Existence of
course of
business when
relevant.

16. When there is a question whether a particular act was done, the existence of any course of business according to which it naturally would have been done is a relevant fact.

Illustrations.

(a.) The question is, whether a particular letter was despatched.

The facts that it was the ordinary course of business for all letters put in a certain place to be carried to the post, and that that particular letter was put in that place, are relevant.

(b.) The question is, whether a particular letter reached A. The facts that it was posted in due course, and was not returned through the Dead Letter Office, are relevant.

The date of a letter is only *primâ facie* evidence of the time of its being written. But a post office stamp renders a letter admissible: *Anderson v. Weston* (6 Bin. N. C. 296); *Polery v. Glossop* (2 Ex. 191); *Butler v. Mountgarret* (7 H. L. Cas. 633).

The press copy of a letter to prove the allotment of

shares in a liquidating company is inadmissible in evidence, there being nothing to show that the original letter was properly addressed or posted: *R. D. Chakarbarh v. O. L. of Cotton Ginning Co.* (I. L. R. 9 A. S. 336).

ADMISSIONS.

17. An admission is a statement, oral or documentary, Admission defined. which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.

A newspaper was held sufficient evidence (in the nature of an extra-judicial confession, statement, or admission) against the proprietor and publisher that an illegal act had been done, and that they had illegally advertised or published it: *R. v. Sullivan* (16 Cox's C. C. 347). The case is an Irish one, at best of an exceptional description, and is opposed to the principle enunciated by Lord Hale (P. C. 290) the authority of Mr. Graves: 3 Russell on Crimes, 366, ed. A.D. 1865, and *R. v. Edgar* (3 Russell, 367). Corroborative evidence of the first illegal act seems wanting.

Evidence of oral admissions ought always to be received with great caution. It is necessarily subject to much imperfection and mistake. The party himself may have been misinformed, or he may not have clearly expressed his meaning (Gospel of John, xxi. 21-23), or the witness may have misunderstood him (Gospel of Matthew, xxvii. 46 and 47), or may purposely misquote the expressions used (John ii. 18-21; Mat-

thew xxvi. 60 and 61). It also sometimes happens that the witness by unintentionally altering a few words will give an effect to the statement completely at variance with what the party actually said : *Alciatus de Præsumptionibus*, Part II., col. 682, n. 6. But where the admission is deliberately made, and precisely identified, the evidence it affords is often of the most satisfactory character.

A deposition of a person in a suit to which he was not a party is in a subsequent suit in which he is a defendant admissible; though he be alive and not called as a witness, section 33 does not apply : *S. Bibee v. A. Ali* (14 B. L. R. App. 3).

An affidavit that an executor had been served with notice to pay money into court, coupled with his silence, was held sufficient ground for an order that he should pay it in : *Freeman v. Cox* (8 Ch. D. 148).

Admissions which have been made without any intention of being acted upon, or which have not been acted upon, or by which the situation of the opposite party has not been prejudiced or altered, though admissible in evidence, are not conclusive : *Carr v. London and N. W. Railway* (L. R. 10 C. P. 307); *Coventry v. Great Eastern Railway* (11 Q. B. D. 776); see also section 115.

Where a lessor, after giving notice to his lessee to do repairs within the time required by the lease, so conducts himself as to lull the lessee asleep, and to lead him to suppose that he might refrain from doing them, the Court will not allow the lessor to insist on

a covenant for forfeiture on the ground that they had not been completed within the time fixed: *Hughes v. Metropolitan Ry. Co.* (L. R. 2 App. Cas. 439).

As to admissions by conduct, see section 8.

If a defendant in an action of salvage admits all the acts pleaded in the statement of claim, evidence in support of additional facts cannot be adduced by the plaintiff unless by leave of the Court, which will only be granted on special grounds: *The Hardwick* (9 P. D. 32).

18. Statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorised by him to make them, are admissions.

Admission—
by party to
proceeding or
his agent;

Statements made by parties to suits, suing or sued in a representative character, are not admissions, unless they were made while the party making them held that character.

by suit or in
representative
character;

Statements made by—

(1) Persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding, and who make the statement in their character of persons so interested, or

by party
interested in
subject-
matter.

(2) Persons from whom the parties to the suit have derived their interest in the subject-matter of the suit,

by person
from whom
interest
derived.

Are admissions, if they are made during the continuance of the interest of the persons making the statements.

The silence of a party, even when the declarations are addressed to himself, at a time too when he is at full liberty to reply as he thinks fit, is, at the best, worth very little as evidence of acquiescence: *Gospel*

of Matthew, xxvi. 59-63, and xxvii. 12-14. Nobility of character may induce a person in such situation to overlook an insult or a falsehood. And even a hero like the Grecian Diomed may consider discretion the better part of valour—Homer's *Iliad*, b. viii.—when grossly insulted by his rival.

A party is held to his admission unless it clearly appears that it was made through mistake. The Roman Law was administered with at least equal, if not greater, severity: *Confessus pro judicato est*, Dig. 42, 2, 1. *Si is cum quo Lege Aquiliâ agitur confessus est servum occidisse, licet non occiderit, si tamen occisus sit homo, ex confesso tenetur*, Dig. 42, 2, 4.

In a suit for rent by ijaradars against cojotedars, an admission by one of the cojotedars in a previous suit by the zemindar against the ijaradars, of an arrangement to pay direct to the zemindar a certain rent, is admissible: *K. S. Dasi v. M. S. Dasi* (I. L. R. 11 C. S. 588).

In a suit the statement that the auction purchaser does not derive any interest from the defaulter is admissible: 8 Suth. Civ. R. 222. The rule applies to partners: *Pritchard v. Draper* (1 Russ. & M. 191).

The admissions of a person whose position in relation to property in suit it is necessary for one party to prove against another, are in the nature of original evidence, and not hearsay, though such person is alive, and has not been cited as a witness: *A. M. Ramathan v. E. K. Achen* (I. L. R. 5 M. S. 239).

The statement of defence made by one defendant

ought not to be read in evidence either for or against his co-defendant, nor the answer to interrogatories of one defendant except as against himself: *Selborne, C., Saltmarsh v. Hardy* (42 L. J. Ch. 422, and L. R. 2 I. A. 129).

An attempt to suborn false witnesses is cogent evidence in the nature of admission by conduct that the cause of the party suborning it, the more especially if a plaintiff is an unrighteous one: *Moriarty v. L. C. and D. Railway* (L. R. 5 Q. B. 314).

The suing or distraining for rent accruing due since a forfeiture, of which the lessor has notice, as also the acceptance of such rent, and perhaps even the demand of it, will, unless the action has actually been brought, amount to an acknowledgment of the tenancy on the part of the lessor, though, if the breach be a continuing one, as the using rooms in a prohibited manner, or the omitting to keep premises insured or repaired, the acceptance of rent after such breach will not amount to a waiver of a subsequent user or omission: *Toleman v. Portbury* (L. R. 6 Q. B. 245, 7 Q. B. 344); *Davenport v. Queen* (L. R. 3 App. Cas. 115); *Grimwood v. Moss* (L. R. 7 C. P. 360); *Walrond v. Hawkins* (L. R. 10 C. P. 342). A valid notice to quit determines a tenancy. The waiver thereof does not revive the old tenancy, but creates a new one: *Holme v. Brunskill* (L. R. 3 Q. B. D. 495); *Ahearn v. Bellman* (L. R. 4 Ex. D. 201); *Tayleur v. Wildin* (L. R. 3 Ex. 303).

A party was held bound by an admission of fact made by his vakil : 2 Moo. I. A. 253.

Where counsel by the authority of their clients consent to an order, such consent cannot be arbitrarily withdrawn, and the proper official must proceed to perfect the order without prejudice to an application to be relieved from the consent on the ground of mistake or surprise or for some other sufficient reason : *Harvey v. Croydon Sanitary Authority* (L. R. 26 Ch. D. 249).

Admissions
by persons
whose position
must be
proved as
against party
to suit.

19. Statements made by persons whose position or liability it is necessary to prove as against any party to the suit are admissions, if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them, and if they are made whilst the person making them occupies such position, or is subject to such liability.

Illustration.

A. undertakes to collect rents for B.

B. sues A. for not collecting rent due from C. to B.

A. denies that rent was due from C. to B.

A statement by C. that he owed B. rent is an admission, and is a relevant fact as against A. if A. denies that C. did owe rent to B.

Admissions
by persons
expressly
referred to by
party to suit.

20. Statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute, are admissions.

Illustration.

The question is, whether a horse sold by A. to B. is sound.

A. says to B.: "Go and ask C., C. knows all about it." C.'s statement is an admission.

21. Admissions are relevant, and may be proved as Proof of admissions against the person who makes them, or his representative against persons making them, in interest; but they cannot be proved by or on behalf of the person who makes them, or by his representative making them, in interest, except in the following cases :— and by or on their behalf.

(1.) An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under section thirty-two.

(2.) An admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.

(3.) An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission.

Illustrations.

(a.) The question between A. and B. is, whether a certain deed is or is not forged. A. affirms that it is genuine, B. that it is forged.

A. may prove a statement by B. that the deed is genuine, and B. may prove a statement by A. that the deed is forged; but A. cannot prove a statement by himself that the deed is genuine, nor can B. prove a statement by himself that the deed is forged.

(b.) A., the captain of a ship, is tried for casting her away.

Evidence is given to show that the ship was taken out of her proper course.

A. produces a book kept by him in the ordinary course of his business, showing observations alleged to have been taken by him from day to day, and indicating that the ship was not taken out of her proper course. A. may prove these statements, because they would be admissible between third parties, if he were dead, under section 32, clause (2).

(c.) A. is accused of a crime committed by him at Calcutta.

He produces a letter written by himself and dated at Lahore on that day, and bearing the Lahore post-mark of that day.

The statement in the date of the letter is admissible, because, if A. were dead, it would be admissible under section 32, clause (2).

(d.) A. is accused of receiving stolen goods knowing them to be stolen.

He offers to prove that he refused to sell them below their value.

A. may prove these statements, though they are admissions, because they are explanatory of conduct influenced by facts in issue.

(e.) A. is accused of fraudulently having in his possession counterfeit coin which he knew to be counterfeit.

He offers to prove that he asked a skilful person to examine the coin, as he doubted whether it was counterfeit or not, and that that person did examine it and told him it was genuine.

A. may prove these facts for the reasons stated in the last preceding illustration.

When oral admissions as to contents of documents are relevant.

22. Oral admissions as to the contents of a document are not relevant, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under the rules hereinafter contained, or unless the genuineness of a document produced is in question.

Admissions in civil cases, when relevant.

23. In civil cases no admission is relevant if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given.

Explanation.—Nothing in this section shall be taken to exempt any barrister, pleader, attorney, or vakil from giving evidence of any matter of which he may be compelled to give evidence under section one hundred and twenty-six.

Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding.

24. A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat, or promise having reference to the charge against the accused person, proceeding from

a person in authority, and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporary nature in reference to the proceedings against him.

“Person in authority.” The Criminal Procedure Code, s. 103, is more comprehensive. “No police officer or person in authority shall offer, or make, or cause to be offered, or made, any such inducement, threat, or promise, as is mentioned in” the present section. “But no police officer or other person shall prevent, by any caution or otherwise, any person from making in the course of any investigations” by the police “any statement which he may be disposed to make of his own free will.”

Causing hurt and wrongfully confining a person in order to extort a confession, are penal offences, I. P. C. ss. 330, 331, 348.

Section 164 of the Criminal Procedure Code gives a magistrate power to record in prescribed manners, statements, and confessions voluntarily made. Section 533 provides for cure of irregularities in record, and section 412 gives the accused a limited appeal: Griffith's C. P. C., ss. 164, 412, 533.

The following extract is made from Best, 7th ed. 480, a work containing much pleasant reading for an antiquarian lawyer, but too abstract in its nature to be of much assistance in practice.

“A party is not in general prejudiced by self-

harming statements made under a mistake of fact. "*Ignorantia facti excusat.*" "*Non videntur qui errant consentire*" (Griffith's *Institutes of Equity*, p. 82). "*Non fatetur qui errat,*" said the Civilians (1 Evidence, Pothier, 800). So money paid under a forgetfulness of facts which were once within the knowledge of the party paying may be recovered back: *Kelly v. Solari* (9 M. & W. 54). But it is very different when the confession is made under a mistake of law. Here the Civilians say, "*Non fatetur qui errat nisi jus ignorarit,*" Justinian's Dig., lib. 42, tit. 2, l. 2. Neither is a party to be prejudiced by a *confessio juris*: 1 Greenleaf Ev. s. 96, 7th ed.

Although this must be understood with reference to a confession of law not involved with facts, for the confession of a matter confounded of fact and law is receivable. Every prisoner or defendant who pleads guilty in a criminal case, admits by his plea both the acts with which he is charged, and the applicability of the law to them. So, on an indictment for bigamy, the first marriage though solemnised in a foreign country may be proved by an admission of the accused: 1 East P. C. 471; but see *R. v. Flaherty* (2 Car. & K. 782).

Self-harming statements may in general be made either by a party himself or those under whom he claims, or by his attorney or agent lawfully authorised—an application of the maxim *Qui per alium facit per seipsum facere videtur*, 4 Coke's Inst. 109; *Qui facit per alium facit per se*, 9 Cl. & F. 850. This, of course,

means that the party against whom the admission or confession is offered in evidence is of capacity to make such admission or confession. On this subject the Civilians laid down, *Qui non potest donare non potest confiteri* (1 Evidence, Pothier, s. 804). So there are some acts which cannot be done by attorney, and some persons who cannot appoint one—as for instance, infants. And the person appointed to act for another cannot delegate this authority to a third.

In Justinian's Rules of Law, Digest, 50, t. 17, b. 142, we find the following, "*Qui tacet non utique fatetur sed tamen verum est eum non negare.*" We may consent expressly or tacitly, hence the phrases "to be willing" and "not to be unwilling." One who is silent neither confesses nor denies; he rather seems to contradict. But slight circumstances in a case may change the balance as indicating the intention or non-intention of the silent person.

A prisoner had admitted that he had killed a man to a captain, who had threatened him as one of the crew with his rifle in order to stop a mutiny. Such a confession is inadmissible: *Q. v. Hicks* (10 B. L. R. App. 1).

The travelling auditor of the G. I. P. Railway is a "person in authority" in respect of a booking-clerk of the company: *R. v. N. Dadabhai* (9 B. H. C. R. 358.)

A confession by a mother of having murdered her infant must be received with caution. Though born dead, fear of exposure may lead to a concealment of

birth. Such a person would be long influenced by a promise of favour: *Q. v. M. Luchoo* (5 B. H. C. N. W. P. 86.)

If a pardon is improperly tendered to a person supposed to be concerned with others in committing an offence, he cannot be legally examined on oath, and his evidence is inadmissible: *E. v. A. Ali* (I. L. R. 2 A. S. 260).

A confession does not become irrelevant merely because the memorandum required by law to be attached thereto by the magistrate taking it has not been written in the exact form prescribed: *E. v. B. Singh* (I. L. R. 3 A. S. 338).

It is always essential that the Court should know as near as possible what were the words used by the supposed confessor, and what were the questions or matters in regard to which they were said. It may be that the words ascribed, taken with the questions put, and the exact subject of inquiry, do not amount to a confession of the guilt believed by the hearers to have been confessed: *E. v. M. Lal* (I. L. R. 4 A. S. 46).

A magistrate, after excluding from his presence the police officers who brought the accused, warned him "that what he would say would go as evidence against him, so he had better tell the truth." A consequent confession was therefore held inadmissible: *Q. E. v. Uzeer* (I. L. R. 10 C. S. 775).

Lord Ellenborough, C.J., held in the trial of Colonel Despard (28 State Trials, 346) that not only as to persons spoken of by an accomplice must there be

corroborating evidence, but, which is more important still as to the crime itself, there must be some evidence pointing the same way to make the testimony of the accomplice satisfactory. And so a conviction based on the testimony of approvers uncorroborated as to the testimony against the accused person cannot be sustained. And confessions of co-prisoners implicating him were held insufficient corroboration of such testimony in *R. v. B. Nanku* (I. L. R. 1 B. S. 475).

Where more persons than one are jointly tried for the same offence the confession made by one of them, if admissible in evidence at all, should be taken into consideration against all the accused, and not against the person alone who made it: *E. v. R. Birapa* (I. L. R. 3 B. S. 12).

On a trial for larceny evidence was received of a confession made by the prisoner to the prosecutor in presence of a police inspector immediately after the prosecutor had said to the prisoner: "The inspector tells me you are making house-breaking implements; if that be so, you had better tell the truth, it may be better for you." The Court of Crown Cases Reserved held that the evidence was inadmissible: *R. v. Fennell* (7 Q. B. D. 147).

25. No confession made to a police officer shall be proved as against a person accused of any offence.

Confession to police officer not to be proved.

This section is to be construed in connection with sections 26 and 27, and not as absolutely and under all circumstances excluding statements voluntarily made

to a police officer. Confessions made whereby no fact was discovered are not to be proved: *E. v. Pancham* (I. L. R. 4 A. S. 198).

For Upper Burma after the words "police officer" the words "who is not a magistrate" are to be inserted. See Act XX. of 1886, s. 7 (1) (*d*).

The term police officer is not to be used in a technical sense, but in its more comprehensive and popular meaning. The section is not to be qualified by the succeeding one: *Q. v. H. C. Ghose* (I. L. R. 1 C. S. 207).

The Commissioner of Police is an officer: S. C. The counsel for one accused person may by questions prove such confession made by another: 1 C. S. 215.

Though a confession to a police officer is not admissible, an admission to him is. But, *quære*, *E. v. D. Pershad* (I. L. R. 6 C. S. 530).

This section does not preclude one accused person from proving a confession made to a police officer by another accused person tried jointly with him. Such confession is to be received or treated as evidence on behalf of the other, not as evidence against the person making it: *I. v. P. Jina* (I. L. R. 2 B. S. 61).

The word "confession" includes a statement intended to be of a self-exculpatory kind, but really a criminating admission: *E. v. Pandharinath* (I. L. R. 6 B. S. 34).

Such evidence is admissible as evidence with regard to the ownership of property in an inquiry held by the magistrate under Griffith's *Crim. P. C.*, s. 523: *Q. E. v. T. Maneckhand* (I. L. R. 9 B. S. 131).

A village magistrate is not a police officer, and therefore a confession to him is not inadmissible:

Q. E. v. S. Papi (I. L. R. 7 M. S. 287).

26. No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a magistrate, shall be proved as against such person.

Confession by accused while in custody of police not to be proved against him.

The word “confession” must not be used so as to include a mere inculpatory admission which falls short of being an admission of guilt: *Q. E. v. Jagrup* (I. L. R. 7 A. S. 646). The confession may be proved by the record or by the magistrate as a witness: *Q. E. v. Milmadhub* (I. L. R. 15 C. S. 596).

A village munsif in the Madras Presidency is such a magistrate: *E. v. Ramanjiyya* (I. L. R. 2 M. S. 5).

27. Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

How much of information received from accused may be proved.

No statement other than a dying declaration made by any person to a police officer in the course of an investigation under Chapter XIV. of Griffith’s *Crim. P. C.* shall, if reduced to writing, be signed by the person making it, or be used in evidence against the accused person. But this rule is not to affect the present section: Griffith’s *Criminal Procedure Code*, s. 162.

In the absence of evidence that the confession of an accused person has been induced by pressure, pressure is not to be presumed: *R. v. B. V. Pendharkar* (11 B. II. C. R. 137).

“Confession or not” qualifies “information” not “so much”: *R. v. J. Hasji* (11 B. H. C. R. 242).

This section is a proviso not only to section 26, but also to section 25, and therefore so much of information given by an accused to a police officer, whether amounting to a confession or not, as relates to facts thereby discovered, may be proved: *Empress v. Kuarpala* (W. N. 1882, p. 225, dissented from); *Q. E. v. B. Lal* (I. L. R. 6 A. S. 509).

No judicial officer should allow the policeman to depose to one more word than is necessary to show how the fact discovered was connected with the accused's statement, so as to render the fact relevant against him. The rest of the confession must be excluded: *Straight, J.* (6 All. 509) followed; (4 All. 108) disapproved; *A. Shikdar v. Q. E.* (I. L. R. 11 C. S. 635); *Q. E. v. Commer* (12 M. S. 153). A robber confessed to stealing Rs. 48, and, spending 8, he then handed over Rs. 40 to the policeman. The former part of the statement is inadmissible, the handing over is admissible: S. C.

The accused were charged with theft of some jwari. During the police investigation, they admitted before the police that they had taken the grain and concealed it in a jar, which they forthwith produced. The identity of the jwari recovered with that stolen

was not proved to the satisfaction of the trying magistrates, except by these admissions, and upon these admissions they were convicted of theft:—*Held*, that, as the prisoners themselves produced the jwari, it was by their own act, and not from any information given by them, that the discovery took place, and, though the fact of the production of the property might be proved, the accompanying confession made to the police was inadmissible in evidence: *Q. E. v. Kamalia* (I. L. R. 10 B. S. 595).

28. If such a confession as is referred to in section twenty-four is made after the impression caused by any such inducement, threat, or promise, has, in the opinion of the Court, been fully removed, it is relevant.

29. If such a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.

30. When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.

Illustrations.

(a.) A. and B. are jointly tried for the murder of C. It is proved

Confession made after removal of impression caused by inducement, threat or promise, relevant.
Confession otherwise relevant not to become irrelevant because of promise of secrecy, &c.
Consideration of proved confession affecting person making it and others jointly under trial for same offence.

that A. said, "B. and I murdered C." The Court may consider the effect of this confession as against B.

(b.) A. is on his trial for the murder of C. There is evidence to show that C. was murdered by A. and B., and that B. said, "A. and I murdered C."

This statement may not be taken into consideration by the Court against A., as B. is not being jointly tried.

A confession to be admissible against a co-prisoner must implicate both parties substantially to the same extent in the commission of the offence for which they are jointly tried: *Q. v. B. Ali* (10 B. L. R. 453).

The confession of a person who says that he abetted a murder, but withdrew before its actual perpetration, cannot be used against the associates though tried with them on a charge of murder: *R. v. Amrita* (10 B. H. C. R. 497).

The evidence requisite for the corroboration of an accomplice must proceed from an independent and reliable source, and previous statements made by the accomplice, though consistent, are insufficient. The confession of one of the prisoners cannot be used for purposes of corroboration: *R. v. Malapa* (11 B. H. C. R. 196); see section 157.

A prisoner who pleads guilty at the trial, and is thereupon convicted and sentenced, cannot be said to be jointly tried with other prisoners who plead not guilty: *R. v. K. Patil* (11 B. H. C. R. 146). While A. and B. were being jointly tried, A. for murder, and B. for abetment, A.'s confession, that he had committed the murder at the instigation of B., was put in evidence against A. The judge altered the charge to one of

abets against A., and used the confession against both A. and B., and convicted them, B.'s vakil not objecting:—*Held*, that the session judge was justified in using the confession against B.: *R. v. G. Babli* (11 B. H. C. R. 278).

This section is an exception. The wording shows that the confession is merely one element for consideration. Unless there is other evidence a conviction will be bad: *Rulings*, p. xv. (7 M. H. C. R.).

The statement of a person tried jointly with other persons for the same offence is not made less an admission as to all that the person knew concerning the offence affecting himself and the other persons by the fact of the Court not thinking him guilty of the offence charged: *Q. v. B. Khan* (5 R. H. C. N. W. P. 213).

A conviction of a person who is being tried together with other persons for the same offence, cannot proceed merely on an uncorroborated statement in the confession of such other persons: *E. v. Bhawani* (I. L. R. 1 A. S. 664).

Where the confession does not implicate the confessor so much as the others, and is not sufficient of itself to justify his conviction, it is not to be considered as against them: *E. v. Ganraj* (I. L. R. 2 A. S. 444); *E. v. Mulu* (S. V. 646).

A. and B. were committed for trial, the former for dacoity, the latter for receiving the stolen property, knowing it to be such. Being tried separately, the confession of A. was inadmissible against B., and the

evidence as to identity of the articles so failing B. was entitled to his acquittal: *E. v. B. Patel* (I. L. R. 5 B. S. 63).

Two accused persons were jointly tried before the sessions judge on a charge of murder. He examined each in the absence of the other, making the latter withdraw during the examination of the former, though without objection from the pleaders of the two persons:—*Held*, that the examination of each could only be used against himself: *E. v. L. Balu* (I. L. R. 6 B. S. 124). To render the statement of one person jointly tried with another for the same offence considerable against the other, it must amount to a distinct confession of the offence charged: *E. v. D. Narsu* (I. L. R. 6 B. S. 288).

The mere production by the accused of stolen property some months after the offence is not sufficient corroboration of the confession of another prisoner: *Q. E. v. D. Jiva* (I. L. R. 10 B. S. 231).

The confession of a prisoner affecting himself and another person charged with the same offence is evidence against both. It cannot justify a conviction unless the corroborating evidence would alone do so: *Diss. Garth, C.J.; E. v. A. Chuckerbutty* (I. L. R. 4 C. S. 483).

The sessions judge when about to examine certain prisoners required all but the prisoners under examination to retire from the court until his turn came round, and convicted each prisoner mainly upon what was said by his co-prisoner during his absence

from court:—*Held*, that the evidence so given was inadmissible: *I. M. P. C. N. Sirkar* (I. L. R. 7 C. S. 65).

A conviction based solely on the evidence of a co-prisoner is bad in law: *R. v. A. Hulagu* (I. L. R. 1 M. S. 163).

Several persons, being charged together with house-breaking, some confessed. The confessions cannot be used on the trial of the others: *Venkatasami v. Q.* (I. L. R. 7 M. S. 102). Nor on a trial of A. for murder, and B. for abetment thereof, can a confession of A. implicating B. be used against B.: *Badi v. Q. E.* (I. L. R. 7 M. S. 579).

31. Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions hereinafter contained. Admissions not conclusive proof, but may estop.

In a suit, if the defendant appears and the plaintiff does not, the Court may dismiss it, unless the defendant admits the claim or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder: *Griffith's Civil Procedure Code*, Act XIV. of 1882, s. 102.

If an accused person admits that he has committed the offence, his admission is to be recorded as nearly as possible in the words used by him, and if he shows no sufficient cause why he should not be convicted the magistrate shall convict him accordingly:

Griffith's *Criminal Procedure Code*, Act X. of 1882, s. 243.

In a suit for a declaration that the defendants were not entitled to exclude the plaintiff from a partnership carried on in India and England, letters written by the plaintiff to a person not a party to the action and containing admissions by the plaintiff material to an issue were admitted, but the plaintiff was to have the opportunity, if he desired it, of explaining them: *Steuart v. Gladstone* (10 Ch. D. 627).

Verbal admissions or declarations of parties which are not put directly in issue by the pleadings, and which consequently have not been open to explanation or disproof, are entitled to little weight. The reception of such evidence would facilitate the production of false testimony: per Cottenham, C. (6 Ch. & Fin. 37). Written admissions also lose some of their weight when the party against whom they are offered in evidence has had no opportunity of explaining them: *Steuart v. Gladstone* (10 Ch. D. 626).

STATEMENTS BY PERSONS WHO CANNOT BE CALLED AS WITNESSES.

Cases in which statement of relevant fact by person who is dead or cannot be found, &c., is relevant.

32. Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:—

When it relates to cause of death;

(1.) When the statement is made by a person as to

the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.'

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

(2.) When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money, goods, securities, or property of any kind; or of a document used in commerce written or signed by him, or of the date of a letter or other document usually dated, written, or signed by him. or is made in course of business;

(3.) When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages. or against interest of maker;

(4.) When the statement gives the opinion of any such person as to the existence of any public right or custom, or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom, or matter had arisen. or gives opinion as to public right or custom, or matters of general interest;

(5.) When the statement relates to the existence of any relationship* by blood, marriage, or adoption between persons as to whose relationship the person making the or relates to existence of relationship;

* See Act No. XVIII. of 1872, s. 2.

statement had special means of knowledge, and when the statement was made before the question in dispute was raised.

or is made in will or deed relating to family affairs;

(6.) When the statement relates to the existence of any relationship* by blood, marriage, or adoption between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait, or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised.

or in document relating to transaction mentioned in section 13, clause (a).

(7.) When the statement is contained in any deed, will, or other document which relates to any such transaction as is mentioned in section thirteen, clause (a).

or is made by several persons, and expresses feelings relevant to matter in question.

(8.) When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.

Illustrations.

(a.) The question is, whether A. was murdered by B.; or A. dies of injuries received in a transaction in the course of which she was ravished. The question is, whether she was ravished by B.; or

The question is, whether A. was killed by B. under such circumstances that a suit would lie against B. by A.'s widow.

Statements made by A. as to the cause of his or her death, referring respectively to the murder, the rape, and the actionable wrong under consideration, are relevant facts.

(b.) The question is as to the date of A.'s birth.

An entry in the diary of a deceased surgeon, regularly kept in the course of business, stating that, on a given day, he attended A.'s mother and delivered her of a son, is a relevant fact.

(c.) The question is, whether A. was in Calcutta on a given day.

A statement in the diary of a deceased solicitor, regularly kept in the course of business, that, on a given day, the solicitor attended

* See Act No. XVIII. of 1872, s. 2.

A. at a place mentioned, in Calcutta, for the purpose of conferring with him upon specified business, is a relevant fact.

(d.) The question is, whether a ship sailed from Bombay harbour on a given day.

A letter written by a deceased member of a merchant's firm, by which she was chartered, to their correspondents in London to whom the cargo was consigned, stating that the ship sailed on a given day from Bombay harbour, is a relevant fact.

(e.) The question is, whether rent was paid to A. for certain land.

A letter from A.'s deceased agent to A., saying that he had received the rent on A.'s account and held it at A.'s orders, is a relevant fact.

(f.) The question is, whether A. and B. were legally married.

The statement of a deceased clergyman, that he married them under such circumstances that the celebration would be a crime, is relevant.

(g.) The question is, whether A., a person who cannot be found, wrote a letter on a certain day. The fact that a letter written by him is dated on that day, is a relevant fact.

(h.) The question is, what was the cause of the wreck of a ship?

A protest made by the captain, whose attendance cannot be procured, is a relevant fact.

(i.) The question is, whether a given road is a public way.

A statement by A., a deceased headman of the village, that the road was public, is a relevant fact.

(j.) The question is, what was the price of grain on a certain day in a particular market? A statement of the price, made by a deceased banya in the ordinary course of his business, is a relevant fact.

(k.) The question is, whether A., who is dead, was the father of B.

A statement by A., that B. was his son, is a relevant fact.

(l.) The question is, what was the date of the birth of A.?

A letter from A.'s deceased father to a friend, announcing the birth of A. on a given day, is a relevant fact.

(m.) The question is, whether, and when, A. and B. were married.

An entry in a memorandum-book by C., the deceased father of

B., of his daughter's marriage with A. on a given date, is a relevant fact.

(n.) A. sues B. for a libel expressed in a painted caricature exposed in a shop window. The question is as to the similarity of the caricature and its libellous character. The remarks of a crowd of spectators on these points may be proved.

(1.) Evidence may be recorded in the absence of an absconding accused person, and afterwards in certain cases used against him: Griffith's *C. P. C.*, s. 512.

Such statements are sometimes termed hearsay, which term is explained to mean that evidence which is not directly arrived at by the personal knowledge of the witness. One writer on the Principles of the Law of Evidence objects to the term as inaccurate, as drawing improper distinctions between what has been said or written. The term is used to designate, in fact, certain kinds of secondary or derivative evidence admissible in practice.

Though dying declarations, when deliberately made under a solemn and religious sense of impending dissolution, and concerning circumstances wherein the deceased was not likely to be mistaken, are entitled to great weight if precisely identified, yet it is always to be recollected that the accused has not the power of cross-examination—a power quite as essential to the eliciting of all the truth as the obligation of an oath can be—and that, where a witness has not a deep sense of accountability to his Maker and an enlightened conscience, the passion of anger and the feelings of revenge, or, in the case of mutual conflict, the natural desire of screening his own misconduct, may affect the

truth and accuracy of his statements, and give a colour to the transaction which, had further investigation been attainable, might have been proved to be incorrect. Moreover, the particulars of the violence to which the deceased had spoken are likely to have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed, and leading both to mistakes as to the identity of persons and to the omission of facts essentially important to the completeness and truth of the narrative: *Jackson v. Kniffen* (2 John. 35; 1 Green, 156), *R. v. Ashton* (2 Lew. C. C. 147).

The law does not provide that the mere signature of a magistrate shall be a sufficient authentication of such declaration. It is obviously desirable that the person who took the statement should be subject to cross-examination as to the dying man's state of mind when he made it, and as to other circumstances: *R. v. F. Adaji* (11 B. H. C. R. 248); section 80 does not render admissible a dying declaration signed by a magistrate.

In a trial on a charge of murder it appeared that the deceased was questioned by various persons shortly before her death as to the circumstances in which the injuries were inflicted on her; that at that time she was unable to speak, but was conscious and made signs. Evidence was offered by the prosecution and admitted by the sessions judge to prove the questions put to the deceased and the replies made by her in answer to such questions:—*Held*, by the full bench

(Mahmood, J., dissenting), that the questions and signs taken together might properly be regarded as verbal statements made by the person as to the cause of her death, and were therefore admissible in evidence : *Q. E. v. Abdullah* (I. L. R. 7 A. S. 385).

In proceedings before a magistrate on a charge of causing grievous bodily harm, two (among other) witnesses were examined on behalf of the prosecution. One of the two was the person assaulted. The prisoners were committed for trial. Subsequently person assaulted died in consequence of the injuries received in the assault. At the trial before the sessions judge charges of murder and of culpable homicide not amounting to murder were added to the charge of grievous hurt:—*Held*, that the deposition of the deceased witness was admissible under this or the following section, notwithstanding the additional charges made before the sessions court: *E. v. R. Mohato* (I. L. R. 7 C. S. 42).

The dying statement must be made in the presence of the accused person : *I. M. P. of K. C. Chunari* (I. L. R. 8 C. S. 154).

(2.) In the absence of all suspicion of sinister motives, a fair presumption arises that entries made in the ordinary routine of business are correct, since the process of invention implying trouble it is easier to state what is true than what is false; that such entries usually form a link in a chain of circumstances which mutually corroborate each other; that false entries would be likely to bring clerks into disgrace with their

employers ; that, as most entries made in the course of business are subject to the inspection of several persons, an error would be exposed to speedy discovery ; and that, as the facts to which they relate are generally known but to few persons, a relaxation of the strict rules of evidence in favour of such entries may often prove convenient, if not necessary, for the due investigation of truth : *Poole v. Dicus* (1 Bing. N. C. 649), *Tindal, C.J., Price v. Torrington* (1 Salk. 285, 2 Lord Raym. 873).

To prove the delivery of goods to a railway company on an indictment for using a forged railway receipt or bill of lading or letter of advice is not a "document used in commerce." *Semble*, it is not in any case. *Q. v. T. Dey* (9 B. L. R. Ap. 42).

A deed of conveyance was tendered in evidence which purported to bear the mark of G. as vendor, and which was duly attested by four witnesses. G., however, denied that she had executed the deed, and said that the mark was not hers. All the attesting witnesses were dead. A witness was called who knew the handwriting of one of them, and who swore that the signature of that witness to the attesting clause was genuine :—*Held*, that the deed was admissible, the execution being sufficiently proved : *A. Paru v. Gannibai* (I. L. R. 11 B. S. 690.)

(3.) It is extremely improbable that declarations made by persons since deceased against their pecuniary or proprietary interest should be false. The regard which men usually pay to their own interest is con-

sidered a sufficient security against any wilful misstatement, and affords also a reasonable inference that the declaration or entries were not made under any mistake of fact or want of information on the part of the declarant. The danger of any fraud in the statement will be still less dreaded if we reflect that the evidence is not receivable till after the death of the declarant, and that, if the opponent can show that the statement was made with any sinister motive, it will at once be rejected. The ordinary tests of truth afforded by the administration of an oath and by cross-examination are certainly here wanting; but their place is in some measure supplied by the circumstances of the declarant; and the inconveniences that would result from the exclusion of evidence having such guarantees for its accuracy in fact, and its freedom from fraud are rightly considered much greater in general than any which are likely to be experienced from its admission: *Phillips v. Cole*, Denman, C.J. (10 A. & E. 106); *Higham v. Ridgeway* (10 East, 109).

A varaspatra (deed of heirship), last heard of A.D. 1847, was admissible A.D. 1881, because it divested a widow of her estate in the property, as being a declaration by her against her interest: *H. C. Dikshit v. M. Lakshman* (I. L. R. 11 B. S. 89).

A hat chitta book is a document kept especially as security for the vendor, and in the absence of fraud it must be considered binding on him: *G. Roy v. A. R. Nacodar* (1 Ind. Jur. N. S. 358).

The dying declaration of a subscribing witness to a

will or bond that he had been engaged in forging the will or bond has been admitted in England, on the ground that if alive he might have been cross-examined, and, further, that if alive such a declaration might have been proved to contradict him : *Aveson v. Kinmaird* (6 East, 193); *Wright v. Littler* (2 Bur. 1244; 1 Wms. B. 346); *Stobart v. Dryden* (1 M. & W. 615); *Doe v. Ridgway* (4 B. & Ald. 55).

(4.) The admissibility of hearsay evidence as to matters of public and general interest may be supported by the following reasons :—The origin of the rights claimed is usually of so ancient a date, and the rights claimed of so undefined and general a character that direct proof of their existence and nature can seldom be obtained and ought not to be required. In matters in which the community are interested all persons must be deemed conversant. As common rights it is to be expected will be talked about in public, the nature of such rights excludes the probability of bias in individuals, and what is dropped in conversation respecting them may be presumed to be true. For the general interest which belongs to the subject would lead to immediate contradiction from others, if the statements proved were false. Reputation can hardly exist without the concurrence of many parties unconnected with each other who are all alike interested in investigating the subject. Such concurrence furnishes strong presumptive evidence of truth. And it is to this prevailing current of assertion that resort is made for evidence, it being to this that every

member of the community is supposed to be privy and to contribute his share.

The term "public" is strictly applied to that which concerns every member of the community, and the term "general" is confined to a lesser though a considerable number thereof.

Except in actions for damages for adultery and in indictments for bigamy, where strict proof of marriage is required, general evidence of reputation in the neighbourhood, even when unsupported by facts or partly contradicted by evidence of a contrary repute, is receivable in proof of marriage: *Lyle v. Ellwood* (L. R. 19 Eq. 98), *Hall, V.-C.*; *Collins v. Bishop* (48 L. J. Ch. 31), *Malins, V.-C.*

(5.) A deceased person in a draft will in his handwriting, but not signed by him, described a woman C. by her maiden name and "as passing as his wife":—*Held*, that the document was admissible in evidence on a question of the declarant's marriage with C.: *I. R. Lambert's Trusts* (56 L. J. Ch. 122).

In inquiries respecting relationship or descent facts must often be proved which occurred many years before the trial, and were known but to few persons, and it is obvious that the strict enforcement of the ordinary rules of evidence in cases of this nature would frequently occasion a grievous failure of justice.

Clause (5) does not include statements made by interested parties in denial in the course of litigation of pedigrees set up by their opponents: *N. Kuar v. C. Din* (I. L. R. 9 A. S. 467).

A person who has been employed as muktar by certain members of a family, but who is not a member thereof nor intimately connected therewith, does not thereby become a person having "special means of knowledge" within this clause: *S. Singh v. R. Bahi* (I. L. R. 12 C. S. 219, and 12 I. A. 183). A family priest stands on a different footing: 4 C. L. R. 73.

A., the son of a deceased zemindar, sued his widow and brother, B. and C., for possession of the zemindar which was impartible. In order to prove that A. was illegitimate, C. filed two petitions, purporting to have been signed and sent to the collector of the district by C., A.D. 1871, referring to A.'s mother as a concubine:—*Held*, that their contents were not evidence, but that the petitions themselves were to show that a complaint was made: *Parvathe v. Thirumalai* (I. L. R. 10 M. S. 334).

The rule which admits hearsay evidence in pedigree cases is confined to the proof of pedigree, and does not apply to proof of birth, death, and marriage in other than pedigree cases. Therefore, in an action for goods sold to which infancy was the defence, an affidavit stating the date of infant's birth made by his deceased father held inadmissible.

Blackburn's Statement, *M. Sturta v. Freccia* (5 Ap. Cas. 623) approved. *Hames v. Guthrie* (A. 13 Q. B. D. 818).

In clauses (5) and (6) after the word "relationship," the words "by blood marriage or adoption" are to be inserted: Act XVIII. of 1872, s. 2.

In a suit to recover possession of property immovable, the plaintiff tendered in evidence a horoscope which he said had been given to him by his mother, and had been seen by members of his family, and used on the occasion of his marriage. He was unable to say by whom the horoscope or an indorsement on it had been made. The indorsement purported to state what his name was:—*Held*, that the horoscope was not admissible: *R. Kallia v. M. Bibee*, and *R. Kallie v. G. D. Singh* (I. L. R. 9 C. S. 613).

Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated.

33. Evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant for the purpose of proving in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable.

Provided—

That the proceeding was between the same parties or their representatives in interest;

That the adverse party in the first proceeding had the right and opportunity to cross-examine;

That the questions in issue were substantially the same in the first as in the second proceeding.

Explanation.—A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

It was resolved by all the judges, in *Lord Morley's*

case, that depositions taken upon a coroner's inquisition upon proof of the death of the witnesses, and oath made by the coroner that the depositions are unaltered, or upon proof that the Witnesses are withdrawn by the prisoner's procurement, are admissible in evidence for the prosecutor on a trial of murder: 6 S. J. 776.

On the trial of Harrison for murder before Lord Holt, the deposition of a witness before the coroner was admitted in evidence for the Crown on reasonable proof being given that the witness had been kept out of the way by the prisoner: 12 S. J. 851. See some discussion on the subject in *Sir John Fenwick's case*: 13 S. J. 591.

As to when and how far deposition at inquiry is relevant at trial, see Griffith's *Criminal Procedure Code*, Act X. of 1882, s. 288. A deposition before the police is not to be used as evidence: S. C., s. 162. One made before a political agent may be: S. C., s. 189. As to an absconding accused person, see S. C., s. 512; a medical witness: S. C., s. 509.

An adopted infant suing by his mother and guardian is not a representative of the mother as party to a former suit: *M. Dabea v. B. Dabea* (15 B. L. R. 1).

Inconvenience to witnesses is not a ground allowed hereby: *E. v. T. Burke* (I. L. R. 6 A. S. 224).

Depositions made in a former proceeding to which the prisoner having absconded was not a party, are not admissible against him under this section. But such depositions made before the committing magis-

trate may be admissible under section 512 of the Criminal Procedure Code: *Q. E. v. I. Singh* (I. L. R. 8 A. S. 672).

The British Consul at Zanzibar, after duly taking the depositions of witnesses on an inquiry as to murder by the prisoner, sent him for trial by the High Court at Bombay, and also the depositions, being unable to compel the witnesses to go:—*Held*, that the depositions were inadmissible: *E. v. D. G. Husein* (I. L. R. 3 B. S. 334).

The incapacity need not be permanent: *E. v. A. Hossein* (I. L. R. 6 C. S. 774). Evidence of a witness taken on a commission is not admissible in a criminal trial unless it be shown to have been taken on an order made by the High Court under Act. X. of 1875, s. 76, or unless admissible under this section: *E. v. D. Pershad* (I. L. R. 6 C. S. 532).

The question whether the proviso is applicable, that is, whether the questions at issue are substantially the same, depends upon whether the same evidence is applicable, although different consequences may follow from the same act: *I. M. P. R. Mohato* (I. L. R. 7 C. S. 42).

The two suits must be brought by or against the same parties or their representatives in interest at the time when the suits are proceeding and the evidence is given: *S. Dass v. M. C. Chuckerbati* (I. L. R. 12 C. S. 627).

In *Morgan v. Nicholl* (I. L. R. 2 C. P. 117), an action of ejectment, A., the plaintiff, proposed to examine

the shorthand writer as to the evidence given in a former suit by a witness who had since died. The former action was by A.'s son, who claimed as A.'s heir of the body, on the supposition that A. was dead, to recover the same premises from defendant's father: —*Held*, that there was no privity of estate between A. and his son, and that the evidence not being admissible against A. was not admissible for him.

Evidence of a witness in a proceeding pronounced to be *coram non judice* is not admissible even after his death. A witness is not a party within the proviso, nor does the word "questions" mean all the questions: *R. Reddi & S. Reddi*, petitioners (I. L. R. 3 M. S. 48).

Evidence includes answers: *Parker v. M'Kenna* (43 L. J. Ch. 802), and affidavits: *Dunne v. English* (L. R. 18 Eq. 524).

In a dispute concerning lands, the testimony given to a fact brought directly into issue is admissible to prove the same point in another action between the same parties and their privies, though the latter action relates to other lands: *Llanover v. Homfray* (19 Ch. D. 224).

On the trial of Count Conigsmark and others for murder, Pemberton, C.J., would not admit the examination of a witness before the magistrate, because it implicated the others: 9 S. T. 23.

Documentary evidence cannot be rejected because it was not adduced in a former suit to which the plaintiff was party: *P. Chatoon v. B. C. Chuckerbutty* (9 W. R. 380).

The reason for admitting the statements mentioned in the two preceding sections is, because they are the best evidence producible.

STATEMENTS MADE UNDER SPECIAL CIRCUMSTANCES.

Entries in books of account when relevant.

34. Entries in books of account, regularly kept in the course of business, are relevant whenever they refer to a matter into which the Court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability.

Illustration.

A. sues B. for Rs. 1,000, and shows entries in his account-books showing B. to be indebted to him to this amount. The entries are relevant, but are not sufficient, without other evidence, to prove the debt.

Where the payment of moneys by a banking firm is distinctly put in issue, the books of the firm being at the most corroborative evidence, a general statement that the books are correctly kept is not sufficient to discharge the burden of proof that lies on the firm, particularly if better means of evidence exist: *G. Pershad v. I. Singh* (23 W. R. P. C. 90). Bankers' books kept according to the custom of mahajuns are not sufficient evidence to establish a demand against the representatives of a deceased customer: *R. S. Kishen v. R. H. Kishen* (5 Moore I. A. 32).

Strict proof of accounts is unnecessary when the opponent, producing no evidence to impugn their accuracy, admits them: 6 Moore I. A. 88.

A. at Calcutta consigned goods through B. at

Calcutta for sale on his (A.'s) own account and risk to C. in London. The goods were sold by C. in London, who sent the account to B. B. had advanced money to A. In a suit by B. against A., the sale account was held *primâ facie* conclusive evidence against A. of the amount realised by the sale; and that, if he wished to falsify the account, the burden of doing so rested upon him: *Doornun v. Stevens* (2 Ind. Jur. N. S. 5). See also 6 Bom. O. C. 39 and 5 Ben. L. R. 613.

It is only such books as are entered up as transactions take place that can be considered as books regularly kept: *Munchersay v. The New Dhurumsey Spinning & Weaving Co.* (I. L. R. 4 B. S. 576).

35. An entry in any public or other official book, register, or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record is kept, is itself a relevant fact.

An entry by an assistant collector under section 5 of Reg. XVI. of 1827, constituting a declaration against a person's title is an official act within this section, and therefore may be admissible: *S. Malapa v. B. Mariapa* (10 B. H. C. R. 199).

A statement by the survey officer, that the name of this or that person was entered as occupant would be admissible if relevant, but it would not be admissible to prove the reasons for such entry as facts in another case: *Govindra v. Ragho* (I. L. R. 8 B. S. 543).

The wajibularz of a mouza in the taluqua, stating the custom of the Bharuha clan in Oudh as to inheritance by daughters, is a relevant fact: *L. Kuar v. M. Singh* (I. L. R. 5 C. S. 744): see section 48.

In a suit for possession of a fishery, the plaintiff sought to put in evidence an admission alleged to have been made in the year 1818 by the defendant's predecessor in title in a written statement in a former suit. The only evidence of the admission was that contained in the decree in the former suit, the ordinary part of which was prefaced with a short statement of the pleadings in the suit. Under the old practice of the Mofussil Courts, it was the duty of the Court to enter in the decree an abstract of the pleadings in the case:—*Held*, that the statement in the decree was admissible: *P. Dassi v. P. C. Singh* (I. L. R. 9 C. S. 586). Entries made under the Bengal Act VII. of 1876, by the collector recording the names of proprietors of revenue-paying estates, are not evidence of the fact of proprietorship: *S. Dasi v. D. Singh* (I. L. R. 9 C. S. 431).

In *S. Dasi v. D. Singh* (I. L. R. 9 C. S. 431) this section was confined to entries of actual facts known to the public officer such as the fact of death or marriage. An entry by a collector under Bengal Act VII. of 1876 of the name of the proprietor of a revenue-paying estate was excluded.

The appellants filed an application for the admission in evidence of certified copies of certain judgments

and decrees rejected by the lower court. They sought to make use of these documents, not as constituting matters in dispute (*res judicatæ*), but as containing summaries of statements made by parties concerned in the management of the plaint properties and as evidence of conduct:—*Hell*, that they were inadmissible either under this section or section 13: *Subramanyan v. Paramaswaran* (I. L. R. 11 M. S. 116).

36. Statements of facts in issue or relevant facts, made in published maps or charts generally offered for public sale, or in maps or plans made under the authority of Government, as to matters usually represented or stated in such maps, charts, or plans, are themselves relevant facts.

Relevancy of statements in maps, charts, and plans.

In some cases the evidence of survey maps may be sufficient to prove a title. But each case must be decided upon its own merits. A survey map is evidence of possession at a particular time, the time at which the survey was made and coupled with other evidence may raise a presumption that the land belonged to the estate at the time of the permanent settlement. When two sets of survey maps taken at an interval of twenty years include the land in question as part of an estate, it may be presumed to have been in the predecessor's possession as appertaining to the estate purchased at two periods separated by twenty years: *S. L. Sahu v. L. Chorodhry* (I. L. R. 15 C. S. 353).

37. When the Court has to form an opinion as to the

Relevancy of statement as to fact of public nature, contained in certain Acts or notifications.

existence of any fact of a public nature, any statement of it, made in a recital contained in any Act of Parliament, or in any Act of the Governor-General of India in Council, or of the Governors in Council of Madras or Bombay, or of the Lieutenant-Governor in Council of Bengal, or in a notification of the Government appearing in the *Gazette of India*, or in the Gazette of any Local Government, or in any printed paper purporting to be the *London Gazette* or the *Government Gazette* of any colony or possession of the Queen, is a relevant fact.

Judicial notice is taken for the purposes of civil suits of the fact that a foreign state has not been recognised by Her Majesty or the Governor-General in Council: Act XIV. of 1882, s. 431; Griffith's *Civil Procedure Code*.

Relevancy of statements as to any law contained in law-books.

38. When the Court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country, and to contain any such law, and any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings, is relevant.

See section 84.

HOW MUCH OF A STATEMENT IS TO BE PROVED.

What evidence to be given when statement forms part of a conversation, document, book, or series of letters or papers.

39. When any statement of which evidence is given forms part of a longer statement, or of a conversation, or part of an isolated document, or is contained in a document which forms part of a book, or of a connected series of letters or papers, evidence shall be given of so much and no more of the statement, conversation, document, book, or series of letters or papers as the Court considers

necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances under which it was made.

JUDGMENTS OF COURTS OF JUSTICE, WHEN RELEVANT.

40. The existence of any judgment, order, or decree which by law prevents any Court from taking cognisance of a suit or holding a trial, is a relevant fact when the question is whether such Court ought to take cognisance of such suit, or to hold such trial.

Previous judgments relevant to bar a second suit or trial.

It is doubtful whether there exists in India (exclusive of the particular jurisdictions which are exercised by the high courts in matters of probate and the like, and which in war might be exercised in matters of prize), any court capable of giving a judgment *in rem*. Therefore a decree of legitimacy was held no bar to a suit by another brother on the ground of illegitimacy: *J. D. R. Kut v. F. D. R. Kut* (11 B. L. R. 244).

In *Moss v. Anglo-Egyptian Navigation Co.* (L. R. 1 Ch. Ap. 108), Stuart, V.C., held, that a previous judgment is not a bar unless everything in controversy as the foundation of relief was also in controversy in the former suit: See also *Flitters v. Alfrey* (L. R. 10 C. P. 29).

In *Brinsmead v. Harrison* (L. R. 6 C. P. 584; 7 C. P. 547), it was held upon the authority of *King v. Hoare* (13 M. & W. 494), that a judgment in an action against one of two tort fœsors is a bar to an action against the other for the same cause, although such judgment be unsatisfied.

See s. 41, and Griffith's Civil Procedure Code, pp. 10-14.

Relevancy of certain judgments in probate, &c., jurisdiction.

41. A final judgment, order, or decree of a competent Court, in the exercise of probate, matrimonial, admiralty, or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person, but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant.

Such judgment, order, or decree is conclusive proof—

That any legal character which it confers accrued at the time when such judgment, order, or decree came into operation ;

That any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment,* order, or decree declares it to have accrued to that person ;

That any legal character which it takes away from any such person ceased at the time from which such judgment,* order, or decree declared that it had ceased or should cease ;

And that any thing to which it declares any person to be so entitled was the property of that person at the time from which judgment,* order, or decree declares that it had been or should be his property.

After the word “judgment,” the words “order or decree” are to be inserted where wanting : Act XVIII. of 1872, s. 3.

This section applies to probates granted prior to the

Hindu Wills Act : *G. C. Roy v. Broughton* (I. L. R. 14 C. S. 862).

The plaintiff sued to recall probate on the ground that the testator was not of sound mind, and that the will was obtained by the undue influence of the defendants, two of whom were the executors and the third universal legatee. After the commencement of the action, four anonymous letters were received—two by the plaintiff in the action, one by her solicitor, and one by her counsel:—*Held*, by the Court of Appeal that the two letters to the plaintiff must be produced, but that the letters to her solicitor and counsel were privileged, for they must be taken to have been sent to them for the purposes of the action, and for the reason of their being the plaintiff's legal advisers in the action; and that the privilege was not lost in consequence of their not having been sent on a request from the counsel and solicitor, or of their not having been obtained by their exertions. In the same action the plaintiff delivered interrogatories for the examination of the defendants asking what payments they had received from the testator by way of payments for services, loan or gift, and whether the universal legatee had, since the death of the testator, made over any and what part of the property to the defendants. The defendants declined to answer these interrogatories as irrelevant:—*Held*, that they must be answered, but that the period in the first was to be limited to three years: *Young v. Holloway* (11 P. D. 117).

The production of the probate of a will does not preclude a party from showing in another Court that the testator was insane at the time of executing it: *Marriot v. Marriot* (1 Str. 666), or that his domicile was not then in England: *Whicker v. Hume* (7 H. L. 124); *Bradford v. Young* (29 Ch. D. 617), provided the object of the evidence is not to impeach the title of the executor. But a judgment of a probate judge on a point put directly in issue and decided by him, declaring "that as far as appears by the evidence the defendant has proved himself next of kin, is conclusive evidence of the relationship in a suit for distribution": *Doglioni v. Crispin* (L. R. 1 H. L. 301).

Relevancy and effect of judgments, orders, or decrees, other than those mentioned in section 41.

42. Judgments, orders, or decrees, other than those mentioned in section forty-one, are relevant if they relate to matters of a public nature relevant to the inquiry; but such judgments, orders, or decrees are not conclusive proof of that which they state.

Illustration.

A. sues B. for trespass on his land. B. alleges the existence of a public right of way over the land, which A. denies.

The existence of a decree in favour of the defendant, in a suit by A. against C. for a trespass on the same land, in which C. alleged the existence of the same right of way, is relevant, but it is not conclusive proof that the right of way exists.

On the trial of Oates for perjury, Jeffries, C.J., held that the journals of the House of Commons were not evidence, because the House could not administer an oath and the journals not a record: 10 S. T. 1163. But, in Lord George Gordon's trial for treason before Lord Mansfield, sworn copies of the journals of the

House of Commons were admitted in evidence: 21 S. T. 650.

Examined copies of the journals of the Houses of Parliament were admitted in evidence: 29 S. T. 685. Instances where the journals have been given in evidence may be found: 7 S. T. 408; 12 S. T. 376.

Original Orders and Rules of Court containing the names of counsel who moved them held to be sufficient evidence that a particular counsel named therein was at the time of motion in the place where the Court then sat: 18 S. T. 177. See *Ramasami v. Appavu* in note to section 13.

43. Judgments, orders, or decrees, other than those mentioned in sections forty, forty-one, and forty-two, are irrelevant, unless the existence of such judgment, order, or decree is a fact in issue, or is relevant under some other provision of this Act. Judgments, &c., other than those mentioned in sections 40-42 when relevant.

Illustrations.

(a.) A. and B. separately sue C. for a libel which reflects upon each of them. C. in each case says, that the matter alleged to be libellous is true, and the circumstances are such that it is probably true in each case, or in neither.

A. obtains a decree against C. for damages on the ground that C. failed to make out his justification. The fact is irrelevant as between B. and C.

(b.) A. prosecutes B. for adultery with C., A.'s wife.

B. denies that C. is A.'s wife, but the Court convicts B. of adultery.

Afterwards, C. is prosecuted for bigamy in marrying B. during A.'s lifetime. C. says that she never was A.'s wife.

The judgment against B is irrelevant as against C.

(c.) A. prosecutes B for stealing a cow from him. B. is convicted.

A., afterwards, sues C. for the cow, which B. had sold to him before his conviction. As between A. and C., the judgment against B. is irrelevant.

(d.) A. has obtained a decree for the possession of land against B. C., B.'s son, murders A. in consequence.

The existence of the judgment is relevant, as showing motive for a crime.

A decree for rent is admissible in evidence against a defendant to prove the rate of rent he was liable to pay, although the decree has not been executed for three years, and has therefore become barred under the Statute of Limitations: *M. B. Manick v. R. Shaw* (11 B. L. R. 370).

This section is limited by section 143. Where one person charges another with having forged a promissory note, and denies that he executed any promissory note, the evidence that a note similar to the one alleged to be forged was executed by him is not admissible, nor even would a judgment founded thereon be admissible: *R. v. P. Apparam* (11 B. H. C. R. 90).

A judgment is admissible under section 13 to establish a right: *N. Ali v. G. Doss* (22 Cal. W. Rep. 365).

A decree obtained against a registered tenant that rent is payable in kind and in cash is not admissible against a person not party thereto, nor claiming through a party, but having obtained the tenure by foreclosure: *R. N. Rai v. R. C. C. Poddar* (I. L. R. 11 C. S. 562).

In a suit for possession of land, the defendant, in order to show the character of his possession, offered in evidence a judgment obtained by him in a suit to

which the plaintiff or his predecessors in title were not parties:—*Held*, that the judgment was admissible in evidence: *P. M. Mukerji v. D. Dabia* (I. L. R. 11 C. S. 745).

Where a foreign court having jurisdiction in the matter, and honestly exercising it, delivers in a proceeding *in rem* a judgment, by which the sale of a British ship lying in a foreign port is ordered, the sale cannot afterwards be impeached in the home country in an action against the vendee, even though the person seeking to impeach it would, by the law of the home country, have a preferential title to the ship. The conflict of law arose out of a maritime lien: *Castrique v. Inrie* (L. R. 4 H. L. 411).

44. Any party to a suit or other proceeding may show that any judgment, order, or decree which is relevant under sections forty, forty-one, or forty-two, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion. Fraud or collusion in obtaining judgment, or incompetency of Court, may be proved.

The language is wide enough to allow a party to a suit in which a judgment has been obtained, to allow a party to aver that, though unreversed, it was obtained by fraud. (Such is not now the English rule: *Huffer v. Allen* (L. R. 2 Ex. 15). It is also wide enough to allow a party to set up his own fraud or collusion in procuring a judgment in order to defeat it. Possibly the words “fraud or collusion” should be read fraud and collusion: *A. Hubibhoy v. V. Cassumbhoy* (I. L. R. 6 B. S. 703).

A purchaser from a mortgagor after the mortgagee had obtained a decree may prove that the decree was obtained by fraud and collusion: *N. Mookopadhya v. A. Bibee* (I. L. R. 12 C. S. 156).

Any judgment or decree obtained by fraud may be impeached: Griffith's Institutes of Equity, pp. 176, 202.

OPINIONS OF THIRD PERSONS, WHEN RELEVANT.

Opinions of experts.

45. When the Court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of handwriting, the opinions upon that point of persons specially skilled in such foreign law, science, or art,* or in questions as to identity of handwriting, are relevant facts.

Such persons are called experts.

Illustrations.

(a.) The question is, whether the death of A. was caused by poison.

The opinions of experts as to the symptoms produced by the poison by which A. is supposed to have died are relevant.

(b.) The question is, whether A., at the time of doing a certain act, was, by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law.

The opinions of experts upon the question whether the symptoms exhibited by A. commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are relevant.

(c.) The question is, whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A.

The opinions of experts on the question whether the two docu-

* See Act No. XVIII. of 1872, s. 4.

ments were written by the same person or by different persons, are relevant.

After the second word “art,” the words “or in questions as to identity of handwriting” are to be inserted: Act XVIII. of 1872, s. 4.

In a suit by A. against the obligors of a bond, the munsif held that the signatures were not genuine, and directed A. to be prosecuted for forgery:—*Held*, that his judgment was not admissible evidence on the prosecution, because he was only bound to hold the opinion that the signatures were not proved: *G. C. Ghose v. E.* (I. L. R. 6 C. S. 247).

The question being whether a house agent was entitled to his commission, as on the sale of a house through his intervention, the purchaser was allowed to be asked whether he thought he should have bought the property if he had not obtained a card to view it from the agent's office: *Mansell v. Clements* (L. R. 9 C. P. 139).

An accountant, who, although not an actuary, was acquainted with the business of life insurance, has been allowed to give evidence as to the average and probable duration of lives and the values of annuities: *Rowley v. L. & N. W. Railway* (L. R. 8 Ex. 221). A nautical witness is frequently treated as an expert: *Fenwick v. Bell* (1 C. & Kir. 312). Upon a question of seaworthiness experienced shipwrights have been frequently called to give an opinion as to whether a ship in the state in which a particular ship was sworn to be on a certain day of the voyage could have been sea-

worthy when the policy was effected: *Thornton v. Royal Exch. Ass. Co.* (Peake, 37).

The evidence of underwriters is admitted to show their practice of considering overvaluations greatly in excess as making the risk speculative: *Ionides v. Pender* (L. R. 9 Q. B. 531). The principle, indeed, is a general one that credit should be given to one skilled in his peculiar profession: Coke Litt. 125 a). And upon it is founded the importance of the *lex mercatoria*, or custom of merchants, and the implied warranty by a skilled labourer, artisan, or artist, that he is reasonably competent for the task he undertakes.

Remarks upon the degree of caution with which evidence of handwriting should be received in criminal cases were made in *De la Motte's Case* (21 S. T. 779).

Evidence as to belief was held sufficient to prove handwriting in *Layer's Case* (16 S. T. 205).

Evidence by comparison of hands was held inadmissible in 9 S. T. 864, note.

The subject was discussed in the case of *The Seven Bishops* (12 S. T. 296).

The then cases and law upon the subject were summarised by Mr. Wynne in his defence of Bishop Atterbury (16 S. T. 546). *Eagleton v. Kingston* contains remarks of Lord Eldon as to the mode of proof and suggestions of Mr. Serjeant Peake as to the reason of the rule (16 S. T. 305, 306).

It should be borne in mind that the evidence of experts is given on the assumption that certain facts occurred, but that it does not in common cases show

whether or not the facts on which the expert gives his opinion really did occur. For instance, Sir B. Brodie and other witnesses in *Palmer's Case* said that the symptoms they had heard described were the symptoms of poisoning by strychnine, but whether the maid-servants and others who described the death were or were not speaking the truth was not a question for them, but for the jury. Strictly speaking, an expert ought not to be asked "Do you think that the deceased man died of poisoning?" He ought to be asked to what cause he would attribute the death of the deceased man, assuming the symptoms attending his death to have been correctly described? Or, whether any cause except poison would account for such-and-such specified symptoms? This, however, is a matter of form. The substance of the rules as to experts is that they are only witnesses, not judges; that their evidence, however important, is intended to be used only as materials upon which others are to form their decision; and that the fact which they have to prove is the fact that they entertain certain opinions on certain grounds, and not the fact that grounds for their opinions do really exist: *Stephen I. E. A.*, p. 121.

A medical man was called to corroborate another who had made a post mortem examination:—*Held*, that he was an expert and ought to be asked his opinion as to the cause of death on the hypothesis that the signs observed at the post mortem were really present and observed: *Q. E. v. M. A. Mullick* (I. L. R. 15 C. S. 589).

Q. v. Maybrick, a very recent *cause célèbre*, shows the doubt which may exist in a medical expert's mind as to poisoning and death being connected as cause and effect.

Facts bearing upon opinions of experts.

46. Facts, not otherwise relevant, are relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant.

Illustrations.

(a.) The question is, whether A. was poisoned by a certain poison.

The fact that other persons, who were poisoned by that poison, exhibited certain symptoms which experts affirm or deny to be the symptoms of that poison, is relevant.

(b.) The question is, whether an obstruction to a harbour is caused by a certain sea-wall.

The fact that other harbours similarly situated in other respects, but where there were no such sea walls, began to be obstructed at about the same time, is relevant.

Opinion as to handwriting when relevant.

47. When the Court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed, that it was or was not written or signed by that person, is a relevant fact.

Explanation.—A person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself, or under his authority, and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.

Illustration.

The question is, whether a given letter is in the handwriting of A., a merchant in London.

B. is a merchant in Calcutta, who has written letters addressed to A. and received letters purporting to be written by him. C. is B.'s clerk, whose duty it was to examine and file B.'s correspondence. D. is B.'s broker, to whom B. habitually submitted the letters purporting to be written by A. for the purpose of advising with him thereon.

The opinions of B., C. and D. on the question whether the letter is in the handwriting of A., are relevant, though neither B., C. nor D. ever saw A. write.

Lord Kenyon said that where a man will not take upon him to say he believes a writing to be in the handwriting of a person but thinks it like, such opinion is evidence: *Garrels v. Alexander* (4 Esp. 37). Lord Eldon doubted the authority of the case, saying that formerly such opinion would not have been evidence: *Eagleton v. Kingston* (8 Ves. 438).

48. When the Court has to form an opinion as to the existence of any general custom or right, the opinions, ^{Opinion as to existence} as to the existence of such custom or right, of persons ^{of right or} who would be likely to know of its existence if it existed, ^{custom, when} ^{relevant.} are relevant.

Explanation.—The expression “general custom or right” includes customs or rights common to any considerable class of persons.

Illustration.

The right of the villagers of a particular village to use the water of a particular well is a general right within the meaning of this section.

Where lands were held by a jagirdar under the

sovereign of an independent State on a jaidad tenure, *i.e.* on a grant of land, together with the public revenue thereof, on condition of keeping up a body of troops to be employed when called on in service of the sovereign, and on the conquest of the State by the East India Company the jagirdar continued in the same position to them :—*Held*, that the resumption of the land by the company, and the seizure of the arms and stores was not an act of State, but within the cognisance of the municipal courts : *P. C., Forster v. Secretary of State for India in Council* (12 B. L. R. 120).

A special usage modifying the ordinary law of succession must be ancient and invariable, and must be established to be so by clear and unambiguous evidence.

By the general Hindu law, where the subject of inheritance is from its nature indivisible, and can therefore descend to one only of several sons of different wives, other than the first wife, of equal caste, the succession is to be determined by priority of birth, and not by priority of the marriages of the respective mothers : *R. Annal v. S. P. Sethurayer* (12 B. L. R. 396). The proof of possession or receipt of rent by a person who pays the land revenue immediately to Government is *primâ facie* evidence of an estate of inheritance in the case of an ordinary zemindari. The evidence is still stronger if it be proved that the estate has passed from ancestor to heir. There is no difference in this respect between a polliani and

an ordinary zemindari : *O. Chetty v. Arbuthnot* (14 B. L. R. 116).

The judgment in a suit in which the cousin of a former manager sued him for a partition of certain villages, some of which were included in the present suit, and in which it was decided that the manager was manager, and not owner, was held by Innes, J. (*Kindersley dissentiente*), to be a decision on a question of public right (7 M. H. C. R. 307).

Where papers do not amount to the record of a custom, they may be admissible as recording the opinions of those likely to know : *L. Kuar v. M. Singh* (I. L. R. 5 C. S. 745).

49. When the Court has to form an opinion as to—

The usages and tenets of any body of men or family, the constitution and government of any religious or charitable foundation, or

The meaning of words or terms used in particular districts or by particular classes of people,

The opinions of persons having special means of knowledge thereon are relevant facts.

A settlement officer should not receive for entry on the *wajib ul-arz* of a village the mere expression of the views of a proprietor, or enter it upon the records relating to the village, the *wajib ul-arz* being intended to be the record of local customs : *U. Parshad v. G. Singh* (I. L. R. 15 C. S. 20).

50. When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed

by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact: Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act, or in prosecutions under sections four hundred and ninety-four, four hundred and ninety-five, four hundred and ninety-seven, or four hundred and ninety-eight of the Indian Penal Code.

Illustrations.

(a.) The question is, whether A. and B. were married.

The fact that they were usually received and treated by their friends as husband and wife is relevant.

(b.) The question is, whether A. was the legitimate son of B. The fact that A. was always treated as such by members of the family is relevant.

K. was accused by D. and P., alleged to be D.'s wife, of raping P., and was committed for trial, charged in the alternative with rape or adultery. The evidence of marriage between D. and P. consisted of their statements that they were married to each other, and of a statement by K. that P. was D.'s wife. K. was convicted on the charge of adultery:—*Held*, that the evidence as to the marital relation of D. and P. was not sufficient: *E. v. Kallu* (I. L. R. 5 A. S. 233).

Strict proof of marriage is required in bigamy, adultery, and the enticing away of married women: *E. v. P. Singh* (I. L. R. 5 C. S. 566).

Even a written agreement which has been set aside by the Court is admissible: *Timma v. Daramma* (I. L. R. 10 M. S. 362).

51. Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant. Grounds of opinion, when relevant.

Illustration.

An expert may give an account of experiments performed by him for the purpose of forming his opinion.

See sections 8 and 11.

CHARACTER WHEN RELEVANT.

52. In civil cases, the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him is irrelevant, except in so far as such character appears from facts otherwise relevant. In civil cases character to prove conduct imputed irrelevant.

This and the two following sections seem to steer a middle course between the English and French systems. The English would not allow evidence of a previous conviction until the passing of sentence. The French allow the whole antecedents of an accused person to be raked up against him—to be put into evidence, to be made the ground of interrogatories to the accused, and his conduct generally to be the basis of arguments against him.

53. In criminal proceedings, the fact that the person accused is of a good character, is relevant.

In criminal cases previous good character relevant.

54. In criminal proceedings, the fact that the accused person has been previously convicted of any offence is relevant; but the fact that he has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.

In criminal proceedings previous conviction relevant, but not previous bad character, except in reply.

Explanation.—This section does not apply to cases in which the bad character of any person is itself a fact in issue.

Character as
affecting
damages.

55. In civil cases, the fact that the character of any person is such as to affect the amount of damages which he ought to receive is relevant.

Explanation.—In sections fifty-two, fifty-three, fifty-four, and fifty-five, the word “character” includes both reputation and disposition; but evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition were shown.

It is a misdirection to a jury to tell them to consider previous convictions as evidence of bad character. Except under very special circumstances, the proper object of using previous convictions is to determine the amount of punishment: *R. Doosadh v. E.* (I. L. R. 5 C. S. 768).

The full bench were constrained after considering the report to the council, and notwithstanding C. P. C. ss. 310 and 75, to hold that in all cases previous convictions are admissible against accused persons even for the mere purpose of prejudice: *Q. E. v. K. C. Das* (I. L. R. 14 C. S. 721).

P A R T I I**ON PROOF.****CHAPTER III.****FACIS WHICH NEED NOT BE PROVED.**

IN a learned note to the title "Of Proofs and Presumptions" in Justinian's Digest, book 22, title 3, by Leeuwen, the meanings of the two terms are thus discussed. "What is a proof? Is it the showing forth of a doubtful thing by arguments, witnesses, instruments, signs, and presumptions, which is the meaning assigned by Gothofredus? Or is it a legally made proof of the doubtful thing? Or the intrinsic demonstration of a thing by legitimate methods appointed by law? Is it the judge's belief in the thing controverted caused by witnesses and records? Or a belief in the truth made in legitimate ways and times? Is it a certain demonstration of what was said and done to be made to a judge in causes controverted before him? Is it the instruments or testimonies by which a belief in the truth is produced? Or a legitimate belief in intention made to the judge by plaintiff and defendant, or by either of them? (2) What are the species of proofs? Instruments, persons, or witnesses; direct, oblique; full, such as that which is caused by two or

more witnesses, by writings worthy of credit, by confession made in law by evidence of the fact, by oath, by legal presumption or indications: half full, such as is one witness, a comparison of letters, private writings, or a weak presumption.

The verb "presume" signifies to take up before, to dare, to approach, to attempt anything contrary to right, to be the first aggressor, to preoccupy, to think, to presage, to cast together, to cogitate, to divine. A presumption is a conjecture or divination in doubtful matters collected by means of their circumstances, from arguments or indications frequently happening. Or presumptions are certain anticipations respecting that which is in the affair perceived by common sense from that which is usually understood and which usually happens, which transfer all the proving on to him against whom they make.

Further, of presumptions one is greater, the other is the less. The former is a presumption of right because introduced by law, and respecting right because it flows from the law, and is esteemed by law as truth. It is a disposition of law presuming and resolving on the presumption as a thing found out. And against it no proof is admitted.

The other presumption is of right only, and is nought but a probable conjecture arising from a certain sign which, no other sign being adduced, is reckoned truth. A presumption differs from a proof. The proof of itself causes credit, the presumption does so by means of things which are certain.

But words written by a creditor do not prove a debt: Justinian's Code, 4, 19, 7. While it is for the plaintiff to prove the credit, it is for the defendant to prove payment of an established credit: Code, 4, 19, 1.

A plaintiff failed in an *ex parte* suit to bring forward sufficient evidence to entitle him to a decree, and asked for an adjournment to enable him to obtain more. Wilson, J., granted a fortnight, remarking that such adjournments were most inconvenient, and that in England applications for them would not be listened to: *Shanks v. Savage* (I. L. R. 7 C. S. 177).

Proof * means anything which serves either immediately or mediately to convince the mind of the truth or falsehood of a fact or proposition; and as truths differ the proofs adapted to them differ also.

The proofs of anything established by induction are the facts from which it is inferred. Proof is also applied to the conviction generated in the mind by proof properly so called.

Evidence was originally the state of being evident, plain, apparent, or notorious; meant—

2ndly. What tends to render evident or generate proof—any matter of fact the effect, tendency, or design of which is to produce in the mind a persuasion, affirmative or disaffirmative, of the existence of some other matter of fact—*Probatio* in Latin, *Preuve* in French.

Where the claim consists of more than two parts,

* Best. 10.

the intermediate links are principal facts with respect to those below, and evidentiary facts with respect to those above them, classifying themselves as sub-alternate, principal, and evidentiary facts.

The criminal law contains some important special rules as to proof, in all criminal courts. Griffith's C. P. C., Act X. of 1882, ss. 509-511; as to a previous conviction, Griffith's C. P. C., s. 511; as to sanity of criminal lunatic, ss. 467, 473, 475; as to use at trial of evidence taken at commitment, ss. 287, 288; as to Queen's evidence and withdrawal of pardon, s. 339; as to admissibility of examination of accused on second trial, section 342. The report of local inquiry as to possession is admissible: Griffith's C. P. C., s. 148. As to age of apprentice see Act XIX. of 1850, s. 2; of child employed in factory, Act XV. of 1881, s. 16; extradition cases, 33 & 34 Vict. c. 52, ss. 14, 15, 36 & 37 Vict. c. 60, s. 4, Griffith's C. P. C., s. 189; as to military matters, 44 & 45 Vict. c. 58, ss. 163-165; as to pay statement to prove enlistment, Act V. of 1875, s. 1; as to forfeiture of property of native soldier, Act XXV. of 1875, s. 6; as to gaming houses, Act III. of 1867, ss. 10, 11.

Facts judicially noticeable need not be proved.

56. No fact of which the Court will take judicial notice need be proved.

Facts of which Court must take judicial notice.

57. The Court shall take judicial notice of the following facts:—

- (1.) All laws or rules having the force of law now or heretofore in force, or hereafter to be in force, in any part of British India;
- (2.) All public Acts passed, or hereafter to be passed

by Parliament, and all local and personal Acts directed by Parliament to be judicially noticed ;

(3.) Articles of War for Her Majesty's Army or Navy ;

(4.) The course of proceeding of Parliament and of the Councils for the purposes of making Laws and Regulations established under the Indian Councils' Act, or any other law for the time being relating thereto :

Explanation.—The word "Parliament," in clauses (two) and (four), includes—

1. The Parliament of the United Kingdom of Great Britain and Ireland ;

2. The Parliament of Great Britain ;

3. The Parliament of England ;

4. The Parliament of Scotland, and

5. The Parliament of Ireland ;

(5.) The accession and the sign manual of the Sovereign for the time being of the United Kingdom of Great Britain and Ireland ;

(6.) All seals of which English Courts take judicial notice: the seals of all the Courts of British India, and of all Courts out of British India, established by the authority of the Governor-General or any Local Government in Council ; the seals of Courts of Admiralty and Maritime Jurisdiction and of Notaries Public, and all seals which any person is authorised to use by any Act of Parliament or other Act or Regulation having the force of law in British India ;

(7.) The accession to office, names, titles, functions, and signatures of the persons filling, for the time being, any public office in any part of British India, if the fact of their appointment to such office is notified in the *Gazette of India*, or in the official Gazette of any Local Government ;

(8.) The existence, title, and national flag of every State or Sovereign recognised by the British Crown :

(9.) The divisions of time, the geographical divisions of the world, and public festivals, fasts, and holidays notified in the official Gazette :

(10.) The territories under the dominion of the British Crown :

(11.) The commencement, continuance, and termination of hostilities between the British Crown and any other State or body of persons :

(12.) The names of the members and officers of the Court, and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of all advocates, attornies, proctors, vakils, pleaders, and other persons authorised by law to appear or act before it :

(13.) The rule of the road* on land or at sea.

In all these cases, and also on all matters of public history, literature, science, or art, the Court may resort for its aid to appropriate books or documents of reference.

If the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so, unless and until such person produces any such book or document as it may consider necessary to enable it to do so.

The existence of war or peace between England and a foreign country is matter of notoriety and need not be expressly proved : *Lord George Gordon's Case* (22 S. T. 230) ; *Peltier's Case* (Ellenborough, C.J., 29 S. T. 616).

Books of history are in some cases admitted in evidence (29 S. T. 492). The Indian Courts take judicial notice of other things such as the ordinary course of nature, the meaning of English words, &c.

* See Act No. XVIII. of 1872, section 5.

After the word "road" in paragraph (13) the words "on land or at sea" shall be inserted: Act XVIII. of 1872, s. 5.

A registered power of attorney is to be admitted without proof, the officer registering being a court within s. 3: *N. K. Koondoo v. Brown* (I. L. R. 14 C. S. 176).

58. No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings: Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.

Facts admitted need not be proved.

As to admissions in plaint, see Griffith's Civil Procedure Code, p. 53; as to their ascertainment, p. 53; admissions as to genuineness of documents, p. 56; agreement to form of issues, pp. 62 and 178.

CHAPTER IV.

OF ORAL EVIDENCE.

Proof of facts
by oral
evidence.

59. All facts, except the contents of documents, may be proved by oral evidence.

Oral evidence should receive its due weight and not be rejected from a general distrust of native testimony nor perjury widely imputed without some grave grounds to support the imputation: *R. Ammah v. K. Nauchear* (17 W. R. 1; 14 M. I. A. 346). The general fallibility of native testimony in India is no ground for concluding against a transaction when the probabilities are in its favour: *B. Lall v. H. Singh* (4 W. R. P. C. 128; 7 M. I. A. 126).

A native case is not necessarily false and dishonest because it rests on a false foundation and is supported in part by false evidence: *Wise v. S. Chowdranee* (7 W. R. P. C. 13; 11 M. I. A. 177).

Oral evidence
must be direct.

60. Oral evidence must, in all cases whatever, be direct; That is to say—

If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

If it refers to a fact which could be perceived by any

other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

If it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds :

Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable :

Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection

Circumstantial evidence of facts seen, heard, or felt, is not excluded. The last "it" in clauses 2 and 3 of the section refers to the fact, not to the evidence thereof : *R. N. Pandit v. J. Ghose* (12 B. L. R. App. 18).

CHAPTER V.

OF DOCUMENTARY EVIDENCE.

THE general rule of Justinian's law was, "*Qui accusare volunt probationes habere debent; cum neque juris neque æquitatis ratio permittat ut alienorum instrumentorum inspiciendorum potestas fieri debeat. Actore enim non probante qui convenitur etsi nihil ipse præstat obtinebit:*" Code 2, 1, 4. "*Actor quod adseverat probare se non posse pro fitendo reum necessitate monstrandi contrarium non adstringit:*" Code 4, 19, 23. "*Ei incumbit probatio qui dicit non qui negat.*" According to English equity a defendant might be called upon to make discovery of evidence common to the cases of the plaintiff and defendant, but not of the title upon which his own case exclusively rested: Griffith's Institutes, 237. Lord Redesdale thus sums up the general principles of a defence to a suit for discovery. 1. The case made by the bill is not such wherein a Court of Equity assumes a jurisdiction to compel discovery. 2. The plaintiff has no interest in the subject or no interest which entitles him to call on the defendant for a discovery. 3. The defendant has no interest in the subject to entitle the plaintiff to institute a suit against him even for the purpose of dis-

covery. 4. There is no priority of title between the plaintiff and defendant which can give the plaintiff a right to the discovery. 5. The discovery if obtained cannot be material. 6. The situation of the defendant renders it improper for a Court of Equity to compel a discovery. Generally speaking it is improper to compel a discovery when (a) it may subject the defendant to pains and penalties; (b) to a forfeiture; (c) it would betray a trust reposed in a counsel, solicitor, or arbitrator; (d) the person interrogated is a purchaser for valuable consideration without notice of the plaintiff's title: *Mitford's Pleadings*, ch. 11., s. 2, parts 1 and 2.

61. The contents of documents may be proved either by primary or by secondary evidence.

Proof of contents of documents.

Where a document is tendered it is the first business of the Court to satisfy itself that the document is admissible. If admissible, but requiring proof, it should be distinctly noted on the record that it is admitted subject to proof, so that if proof be not offered the opposite party may ask the Court to take it off the record: *Manson v. G. K. Moonshee* (15 W. R. 490).

The production of a forged document in evidence by a party to a suit does not relieve the Court from the duty of examining the whole evidence on both sides, and of deciding the case according to the truth of the matters in issue: *Surnomoyee v. S. Roy* (2 W. R. P. C. 13).

As to production of documents, see note to section 2, pp. 34-37.

As to taking samples or making experiments : Griffith's Civ. P. C. Act XIV. of 1882, s. 499.

It is a cardinal rule of evidence, one not of technicality, but of substance, which it is dangerous to depart from, that where written documents exist they shall be produced as being the best evidence of their contents. Special authority to an agent to sign an acknowledgment of debt within Act IX. of 1871 cannot be proved by oral evidence of the contents of a letter whose production is not accounted for : *D. Debi v. R. L. Singh* (L. R. 7 I. A. 8).

The rules as to the admission of secondary evidence are subordinate to, or exceptions from, the cardinal rule that a party to a contentious suit must produce the best evidence in his possession. These rules are concerned with the quality, not the quantity, of the evidence. The cardinal rule is designed to prevent a species of fraud which litigants, especially in India, are tempted to commit--the withholding of or tampering with evidence against them, by abstaining from telling or producing the truth, the whole truth, and nothing but the truth. The subordinate rules are necessitated by the exigencies of business. They extend, it is to be remarked, not only to documentary, but to oral evidence also. For where a witness has given his testimony under oath in a judicial proceeding in which the opponent had the opportunity of cross-examining him, the testimony so given will, if the witness him-

self cannot be called, be admitted in any subsequent suit between the same parties or those claiming under them, provided it relate to the same subject or substantially involve the same material questions: *Duchess of Kingston's Case*, 20 State Trials, and section 33.

62. Primary evidence means the document itself produced for the inspection of the Court. Primary evidence.

Explanation 1.—Where a document is executed in several parts, each part is primary evidence of the document:

Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

Explanation 2.—Where a number of documents are all made by one uniform process, as in the case of printing, lithography, or photography, each is primary evidence of the contents of the rest; but where they are all copies of a common original, they are not primary evidence of the contents of the original.

Illustration.

A person is shewn to have been in possession of a number of placards, all printed at one time from one original. Any one of the placards is primary evidence of the contents of any other, but no one of them is primary evidence of the contents of the original.

Where a document contains (1) a covenant, (2) a hypothecation, both being to secure the loan, it is good evidence of the loan, though inadmissible under the Registration Act to prove the hypothecation: *K. L. Ghose v. B. Roy* (I. L. R. 5 C. S. 611).

No document required by section 17 of the Regis-

tration Act, 1877, to be registered shall affect any immoveable property comprised therein, or confer any power to adopt, or be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered in accordance with the provisions of Act III., 1877, s. 49.

Where a discrepancy between a lease and its counterpart is shewn the law presumes that the lease is correct if it be not clear that the mistake is in that instrument: *Burchell v. Clark* (L. R. 2 C. P. D. 88, overruling S. C. 1 C. P. D. 602).

When no bought and sold notes have been transmitted by brokers to their principals recourse may be had to the signed entry in the book kept by the broker, or indeed to any other memorandum made by him as agent for both parties: *Thompson v. Gardiner* (1 C. P. D. 777).

Secondary evidence.

63. Secondary evidence means and includes—

- (1.) Certified copies given under the provisions herein-after contained;
- (2.) Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;
- (3.) Copies made from or compared with the original;
- (4.) Counterparts of documents as against the parties who did not execute them;
- (5.) Oral accounts of the contents of a document given by some person who has himself seen it.

Illustrations.

(a.) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.

(b.) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it is shewn that the copy made by the copying machine was made from the original.

(c.) A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence; but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.

(d.) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine-copy of the original, is secondary evidence of the original.

In a case of treason where the prisoner took away a portion of certain printed placards from the printer, it was held that they were all duplicate originals, and that a copy remaining with the printer might be read in evidence for the prosecution to shew the prisoner's knowledge of their contents, without giving the prisoner notice to produce the portion taken away by him : *Watson's Case* (32 S. T. 85).

Probable evidence of the destruction of a written document is sufficient to let in secondary evidence of its contents : *Justice Johnson's Case* (29 S. T. 437).

An alleged copy of an original decree said to have been destroyed by fire is not admissible as primary or secondary evidence until it has been proved to have been compared with the decree : *R. Prasad v. R. Prasad* (I. L. R. 7 A. S. 738).

A written statement of the contents of a copy of a document, the original of which the person making the statement has not seen, cannot be accepted as an equivalent of that oral account of the contents of a document by a person who has seen it rendered ad-

missible by the section: *Kanayalal v. Pyarabai* (I. L. R. 7 B. S. 139).

Secondary evidence tendered to prove the contents of an instrument which is retained by the opposite party after notice to produce it, can only be admitted in the absence of evidence to shew that when it was last seen it was unstamped: *Sennandan v. Kollakiran* (I. L. R. 2 M. S. 208).

Where a commission to take evidence is issued to any place beyond the jurisdiction of the Court issuing the commission, it is not necessary in order to admit secondary evidence of the document's contents, that the party tendering it should have given notice to produce the original, nor is it necessary for him to prove a refusal to produce the original: *Ralli v. G. K. Swee* (I. L. R. 9 C. S. 939).

Proof of documents by primary evidence.

Cases in which secondary evidence relating to documents may be given.

64. Documents must be proved by primary evidence except in the cases hereinafter mentioned.

65. Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:—

(a.) When the original is shewn or appears to be in the possession or power

Of the person against whom the document is sought to be proved, or

Of any person out of reach of, or not subject to, the process of the Court, or

Of any person legally bound to produce it,

And when, after the notice mentioned in section sixty-six, such person does not produce it;

(b.) When the existence, condition, or contents of the original have been proved to be admitted in writing by

the person against whom it is proved, or by his representative in interest ;

(*c.*) When the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time ;

(*d.*) When the original is of such a nature as not to be easily moveable ;

(*e.*) When the original is a public document within the meaning of section seventy-four ;

(*f.*) When the original is a document of which a certified copy is permitted by this Act, or by any other law in force in British India, to be given in evidence ;

(*g.*) When the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

In cases (*a*), (*c*), and (*d*), any secondary evidence of the contents of the document is admissible.

In case (*b*), the written admission is admissible.

In case (*c*) or (*f*), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (*g*), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

A suit being brought on an unstamped promissory note, the defendant's admission of its contents are inadmissible in evidence, and the suit must be rejected : *Damodar v. Atmaram* (I. L. R. 12 B. S. 443 ; 10 M. S. 94). But see 4 A. S. 135 ; 7 C. S. 256.

Under clauses (*a*), (*c*), or (*d*), any secondary evidence

is admissible : I. M. collision between *Ava* and *Brenhilda* (I. L. R. 5 C. S. 569). Under clause (c), where the document is shewn to have been lost in proper custody and to be more than thirty years old, secondary evidence is admissible without proof of the execution of the original : *K. C. Mookerjee v. K. P. Sreeterutno* (I. L. R. 5 C. S. 886) ; see section 90.

By the law of evidence administered in England which has been in a great measure with respect to deeds made the law of India, the first condition of the right to give secondary evidence of the contents of a document not produced in Court is the accounting for the non-production of the original : *P. C., B. Debi v. H. S. Moitra* (I. L. R. 6 C. S. 720).

In none but the cases specified can secondary evidence be given : *K. K. Chaudhrani v. K. L. Roy* (P. C. I. L. R. 14 C. S. 486).

In a suit by the purchaser of a debt, the plaintiff stated that A.D. 1873, A. executed a bond in favour of B. to secure the repayment of Rs.1000, and that he had purchased the interest of B. at a sale in execution of the decree against him. The plaintiff now sued A. upon the bond making B. a party, A. denied the execution. The plaintiff having served notice on B. to produce it, which he did not do, tendered secondary evidence of the contents. No evidence of its destruction was offered, and B. not examined as a witness :—*Held*, that the secondary evidence was inadmissible ; Prinsep, J., dissenting : *W. C. Ghose v. S. S. Bai* (I. L. R. 7 C. S. 98).

66. Secondary evidence of the contents of the documents referred to in section sixty-five, clause (a), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is,* or to his attorney or pleader, such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case:

Rules as to notice to produce.

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it:—

(1.) When the document to be proved is itself a notice;

(2.) When, from the nature of the case, the adverse party must know that he will be required to produce it;

(3.) When it appears or is proved that the adverse party has obtained possession of the original by fraud or force;

(4.) When the adverse party or his agent has the original in Court;

(5.) When the adverse party or his agent has admitted the loss of the document;

(6.) When the person in possession of the document is out of reach of, or not subject to, the process of the Court.

After the first word “is” “or to his attorney or pleader” are to be inserted: Act XVIII. of 1872, s. 6.

67. If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person’s handwriting must be proved to be in his handwriting.

Proof of signature and handwriting of person alleged to have signed or written document produced.

* See Act No. XVIII of 1872, section 6.

As to signature of proceedings at council, see section, 57 and 53 Geo. III. c. 155, s. 79; of acts of council, 39 & 40 Geo. III. c. 79, s. 12; of magistrates' warrant, Act XXIV. of 1859, s. 54, Act V. of 1861, s. 43; of officer under Indian Articles of War, Act V. of 1869, pl. iii. f.; of chemical examiner, Griffith's Criminal Procedure Code Act X. of 1882, s. 510.

Proof of execution of document required by law to be attested.

68. If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence.

The rule applies to probates of wills.

Bowman v. Hodgson (L. R. 1 P. & D. 362).

Proof where no attesting witness found.

69. If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

Admission of execution by party to attested document.

70. The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.

Proof when attesting witness denies the execution.

71. If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.

Proof of document not required by law to be attested.

72. An attested document not required by law to be attested may be proved as if it was unattested.

Comparison of signature, writing or seal

73. In order to ascertain whether a signature, writing, or seal is that of the person by whom it purports to have

been written or made, any signature, writing, or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing, or seal has not been produced or proved for any other purpose.

The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

PUBLIC DOCUMENTS.

74. The following documents are public documents.— Public documents

1. Documents forming the acts, or records of the acts—

- (i) Of the sovereign authority,
- (ii) Of official bodies and tribunals, and
- (iii) Of public officers, legislative, judicial, and executive, whether of British India, or of any other part of Her Majesty's dominions, or of a foreign country.

2. Public records kept in British India of private documents.

The statute law contains numerous rules as to proof and admissibility of documents, see note to section 2.

A jamabandi prepared by a deputy collector while engaged in the settlement of land under Reg. VII. of 1822, is a public document.

It is not necessary to shew that at the time when such document was prepared a ryot affected by its provisions was a consenting party to the terms therein specified: *T. Patur v. A. C. Dutt* (I. L. R. 4 C. S. 79).

A mate's certificate granted by the Board of Trade

is not a public document : *I. M. Collision between Ava and Brenhilda* (I. L. R. 5 C. S. 568).

Documents purporting to be abstracted from or copies of Government measurement chittas bearing date Mughli 1126-27 (= A.D. 1704) were produced from the collectorate :—*Held*, that there being no evidence as to their correctly representing the chutian or abstract of the chittas as to their date, or in what respect they were of public use, they were inadmissible as public documents : *N. Roy v. A. Raheem* (I. L. R. 7 C. S. 76).

An anumatapatra is not a public document : *P. C. K. K. Chaddhrani v. K. L. Roy* (I. L. R. 14 C. S. 486). The recording of an anumatapatra containing a power of adoption does not make it a certified copy : S. C.

Private documents.

Certified copies of public documents.

75. All other documents are private.

76. Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal ; and such copies so certified shall be called certified copies.

Explanation.—Any officer who, by the ordinary course of official duty, is authorized to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section.

It was not a general rule that copies of no documents but records are admissible in evidence, if the originals existed: 21 S. T. 650, note. The correct principle appears, A.D. 1828, to be that wherever an original is of a public nature, and would be evidence if produced, an immediate sworn document thereof will be evidence: 21 S.T. 651, note. Lord Erskine's opinion on this subject in *Lord Melville's Case* is valuable: 29 S. T. 695.

See *K. K. Chaddhrani v. K. L. Roy*, in note to section 74.

77. Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies.

Proof of documents by production of certified copies.

A certified copy of a plaint is admissible, but not the written statement: *H. M. Shahabooddeen v. D. Wedgeberry* (10 B. L. R. App. 31).

78. The following public documents may be proved as follows:—

Proof of other official documents.

(1.) Acts, orders, or notifications of the Executive Government of British India in any of its departments, or of any Local Government or any department of any Local Government,

By the records of the departments, certified by the heads of those departments respectively,

Or by any document purporting to be printed by order of any such Government:

(2.) The proceedings of the Legislatures,

By the journals of those bodies respectively, or by published Acts or abstracts, or by copies purporting to be printed by order of Government:

(3.) Proclamations, orders, or regulations issued by Her

Majesty or by the Privy Council, or by any department of Her Majesty's Government,

By copies or extracts contained in the *London Gazette*, or purporting to be printed by the Queen's Printer :

(4.) The acts of the Executive or the proceedings of the legislature of a foreign country,

By journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or sovereign, or by a recognition thereof in some public Act of the Governor-General of India in Council :

(5.) The proceedings of a municipal body in British India,

By a copy of such proceedings, certified by the legal keeper thereof, or by a printed book purporting to be published by the authority of such body :

(6.) Public documents of any other class in a foreign country,

By the original, or by a copy certified by the legal keeper thereof, with a certificate under the seal of a Notary Public, or of a British Consul or diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country.

PRE-SUMPTIONS AS TO DOCUMENTS.

Presumption
as to genu-
ineness of
certified
copies.

79. The Court shall presume every document purporting to be a certificate, certified copy, or other document, which is by law declared to be admissible as evidence of any particular fact, and which purports to be duly certified by any officer in British India, or by any officer in any Native State in alliance with Her Majesty, who is duly authorized thereto by the Governor-General in Council, to be genuine : Provided that such document is

substantially in the form and purports to be executed in the manner directed by law in that behalf.

The Court shall also presume that any officer by whom any such document purports to be signed or certified, held, when he signed it, the official character which he claims in such paper.

Documentary evidence is returned on retention of a certified copy: Griffith's Civ. P. C. Act XIV. of 1882, s. 144; a certificate of judgment and decree is obtainable under ss. 217, 580. A certified copy of sentence is receivable in proof of previous conviction on acquittal: Griffith's Cr. P. C. Act X. of 1882, s. 511. And on appeal a certified copy of record is sent to the Privy Council: Griffith's Civ. P. C. s. 511.

80. Whenever any document is produced before any Court, purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceeding or before any officer authorized by law to take such evidence, or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any judge or magistrate, or by any such officer as aforesaid, the Court shall presume—

Presumption as to documents produced as record of evidence.

That the document is genuine; that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement, or confession was duly taken.

As to certificates of circumstances attending record of evidence, see Act VIII. of 1876, s. 43; Act I. of 1859, s. 111; M. Act VI. of 1867, s. 20.

But see *Q. E. v. Riding* and *Q. E. v. P. Singh* in note to section 114 (e).

See *R. v. F. Adaji* cited in the note to section 32.

This section does not warrant a presumption that the deposition of a medical witness was taken in accused's presence, and therefore admissible under Griffith's *Crim. P. C.*, s. 509: *Q. E. v. P. Singh* (I. L. R. 10 A. S. 174).

A deposition made by a person whether between the grant and revocation of a pardon or otherwise, is not admissible in evidence against him in a subsequent proceeding without proof of the identity of the person accused and the deponent: *Q. E. v. D. Sonar* (I. L. R. 11 C. S. 580).

As a magistrate ought not to examine an accused on a confession made by him before there is any evidence against him, the record by the magistrate in his confessional capacity of the confessional statement is not admissible under this section. The record was according to Griffith's *Crim. P. C.* 364: *Q. E. v. Viran* (I. L. R. 9 M. S. 224).

Presumption
as to Gazettes,
newspapers,
private Acts of
Parliament,
and other
documents.

81. The Court shall presume the genuineness of every document purporting to be the *London Gazette*, or the *Gazette of India*, or the Government Gazette of any Local Government, or of any colony, dependency, or possession of the British Crown, or to be a newspaper or journal, or to be a copy of a private Act of Parliament printed by the Queen's Printer, and of every document purporting to be a document directed by any law to be kept by any person, if such document is kept substantially in the form required by law, and is produced from proper custody.

Presumption
as to docu-
ment admis-

82. When any document is produced before any Court, purporting to be a document which, by the law in force

for the time being in England or Ireland, would be admissible in proof of any particular in any Court of Justice in England or Ireland, without proof of the seal, or stamp, or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed, the Court shall presume that such seal, stamp, or signature is genuine, and that the person signing it held, at the time when he signed it, the judicial or official character which he claims.

And the document shall be admissible for the same purpose for which it would be admissible in England or Ireland.

83. The Court shall presume that maps or plans purporting it to be made by the authority of Government were so made, and are accurate; but maps or plans made for the purposes of any cause must be proved to be accurate.

Presumption as to maps or plans made by authority of Government.

The presumption is not affected, though the map be superseded by a more recent one: *J. Singh v. B. N. Dutt* (I. L. R. 5 C. S. 822).

Chittas made by Government for its own private use are nothing more than documents prepared for the information of the collector, and are not evidence against private persons for the purpose of proving that the lands described therein are of a particular description or tenure: *R. C. Sao v. B. Nqik* (I. L. R. 9 C. S. 741).

As to a map made by an officer of Government which was in his possession as a private proprietor, see *J. Mullick v. D. Mytee* in notes to section 13.

84. The Court shall presume the genuineness of every book purporting to be printed or published under the

Presumption as to collections of laws and reports of decisions.

authority of the Government of any country, and to contain any of the laws of that country.

And of every book purporting to contain reports of decisions of the Courts of such country.

Presumption
as to powers
of attorney.

85. The Court shall presume that every document purporting to be a power of attorney, and to have been executed before, and authenticated by, a notary public, or any Court, judge, magistrate, British consul, or vice-consul, or representative of Her Majesty, or of the Government of India, was so executed and authenticated.

Presumption
as to certified
copies of
foreign
judicial
records.

86. The Court may presume that any document purporting to be a certified copy of any judicial record of any country not forming part of Her Majesty's dominions, is genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of Her Majesty, or of the Government of India, resident in such country, to be the manner commonly in use in that country for the certification of copies of judicial records.

There being no representative of the Government residing at Cooch Behar a notification published in the *Calcutta Gazette*, A.D. 1879, April 8, under Griffith's Civ. P. C. s. 434, now section 229 (b), does not render certified copies of the judicial records of that state admissible in evidence:—*Quære*, whether the present section was complied with even when a deputy commissioner resided there: *G. M. Sarhar v. T. C. Chuckerbati* (I. R. 14 C. S. 546).

Presumption
as to books,
maps, and
charts.

87. The Court may presume that any book to which it may refer for information on matters of public or general interest, and that any published map or chart, the statements of which are relevant facts, and which is produced for its inspection, was written and published by the person,

and at the time and place, by whom or at which it purports to have been written or published.

88. The Court may presume that a message, forwarded from a telegraph office to the person to whom such message purports to be addressed, corresponds with a message delivered for transmission at the office from which the message purports to be sent; but the Court shall not make any presumption as to the person by whom such message was delivered for transmission.

Presumption as to telegraphic messages.

In England the original message is the primary best evidence, and the copy received is only admissible on proof that the original has been destroyed: *R. v. Regan* (16 Cox C. C. 203).

89. The Court shall presume that every document, called for and not produced after notice to produce, was attested, stamped, and executed in the manner required by law.

Presumption as to due execution, &c., of documents not produced.

90. Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

Presumption as to documents thirty years old.

Explanation.—Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.

This explanation applies also to section eighty-one.

Illustrations.

(a.) A. has been in possession of landed property for a long time. He produces from his custody deeds relating to the land showing his titles to it. The custody is proper.

(b.) A. produces deeds relating to landed property of which he is the mortgagee. The mortgagor is in possession. The custody is proper.

(c.) A., a connection of B., produces deeds relating to lands in B.'s possession, which were deposited with him by B. for safe custody. The custody is proper.

In a criminal case where a letter is proved to have come from the custody of a prisoner, it may be used in evidence against him without proof of his handwriting: *Layer's Case* (16 S. T. 206).

The possession of a gumasta (or agent) being that of his master, makes the gumasta's custody of a varaspatra (deed of heirship) of thirty years age proper custody: *H. C. Dikshit v. M. Lakshman* (I. L. R. 11 B. S. 89).

The presumption may be made even where the document is proved by secondary evidence: *K. C. Mookerjee v. K. P. Sreeterutno* (I. L. R. 5 C. S. 886).

The filing of such document amongst the records of a court is not without an adjudication thereon any evidence of its genuineness: *G. P. Chowdhry v. B. C. Bhattachargi* (I. L. R. 5 C. S. 918).

The word "may" is to be noted: see section 4. Before accepting such document as proof of title the Court must satisfy itself that the person who purports to have affixed his signature to the document

was a person who at the time was entitled to grant the document: *N. Chowdhry v. H. C. Shickdar* (I. L. R. 6 C. S. 209).

The application of the rule as to the proof of execution of documents thirty years old requires special care and caution in India.

The custody by a daughter of a pollah under which she professes to hold, and under which has held, for forty years from her father's death without interruption by his heirs, is the proper custody: *J. N. Nundi v. S. Chungoni* (I. L. R. 11 C. S. 539).

The place of proper custody should be searched, and the person, in whose custody it ought to be, should be called in order to justify the use of secondary evidence. The construction of the document or its copy is chiefly the duty of the Court. In its interpretations the Court endeavours to carry into effect the intentions of the parties: Co. Litt. 36 a. It interprets the words most strongly against the party employing them. It rejects surplusage as immaterial, as well as mere false description: 3 Rep. 10, 6 T. R. 676; and restrains general words according to the subject-matter or person to which they relate: Bacon's Maxims, Reg. 10. A material alteration in an instrument after its completion by whomsoever made renders it inoperative: *Pigot's Case*, 11 Rep. 26 b; *Master v. Miller* (4 T. R. 320).

CHAPTER VI.

OF THE EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE.

Evidence of terms of contracts, grants, and other dispositions of property reduced to form of document.

91. When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant, or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

Exception 1.—When a public officer is required by law to be appointed in writing, and when it is shewn that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

Exception 2.—Wills* admitted to probate in British India may be proved by the probate.

Explanation 1.—This section applies equally to cases in which the contracts, grants, or dispositions of property referred to are contained in one document, and to cases in which they are contained in more documents than one.

Explanation 2.—Where there are more originals than one, one original only need be proved.

Explanation 3.—The statement, in any document what-

* See Act No. XVIII. of 1872, section 7.

ever, of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.

Illustrations.

(a.) If a contract be contained in several letters, all the letters in which it is contained must be proved.

(b.) If a contract is contained in a bill of exchange, the bill of exchange must be proved.

(c.) If a bill of exchange is drawn in a set of three, one only need be proved.

(d.) A. contracts, in writing, with B., for the delivery of indigo upon certain terms. The contract mentions the fact that B. had paid A. the price of other indigo contracted for verbally on another occasion.

Oral evidence is offered that no payment was made for the other indigo. The evidence is admissible.

(e.) A. gives B. a receipt for money paid by B.

Oral evidence is offered of the payment.

The evidence is admissible.

“No evidence.” These words are qualified by Griffith’s *Crim. P. C. Act X. of 1882, s. 533*, which enables a Criminal Court to take evidence of a confession or other statement of an accused person not recorded in the prescribed mode.

In exception (2) for the words “under the Indian Succession Act” are substituted the words “admitted to probate in British India:” *Act XVIII. of 1872, s. 7.*

The defendant deposited certain title deeds with the plaintiff as security for the repayment of Rs.1200 lent him by the plaintiff at the time when the deposit was made. On the evening of the same day the defendant by way of further security gave the plaintiff

a promissory note for the amount of the loan, and indorsed thereon the following memorandum: "For the repayment of the loan of Rs.1200 and the interest due thereon of the within note of hand, I hereby deposit with the plaintiff as a collateral security by way of equitable mortgage title deeds of my property," &c.:—*Held*, that the memorandum did not require registration. The mortgage was complete without the memorandum. The latter was not made as evidence of the contract, but was only evidence of the fact from which the contract was to be inferred: *K. Dutt v. S. Khettry* (11 B. L. R. 405).

When a confession under Griffith's Crim. P. C. is reduced to writing, but is inadmissible, oral evidence of it cannot be given: *R. v. B. Ratan* (10 B. H. C. R. 166).

"Duly made" in Griffith's Crim. P. C., Act X. of 1872, ss. 122, 346, probably means made in such a manner as not to be rendered inadmissible by ss. 24, 25, or 26 of the Evidence Act: S. C.

A confession not taken in the form of question and answer is inadmissible: *R. v. Amrita* (10 B. H. C. B. 497).

This section excludes secondary evidence of an improperly signed confession: *R. v. B. Ratan* (10 B. H. C. R. 166) followed; *R. v. D. Anand* (11 B. H. C. R. 44). But it does not generally render inadmissible oral evidence of statements to police officer during the investigation: *R. v. U. Kapurchand* (11 B. H. C. R. 120).

Should a promissory note to pay a certain debt by instalments be unstamped, and an action be brought to recover the book debt, the note will be inadmissible to prove the terms as to the instalments: *B. Das v. B. Das* (I. L. R. 3 A. S. 717).

H. lent Rs.85 to D. on a pledge of moveable property. D. repaid H. Rs.40, and at the time of repayment acknowledged orally that the balance of the debt was due. It was agreed at the same time that D. should give H. a promissory note for such balance, and that the property should be returned. Accordingly D. gave H. a promissory note for Rs.45, and the property was returned to him. H. subsequently sued D. on such oral acknowledgment for Rs.45 ignoring the promissory note, which being insufficiently stamped was not admissible in evidence:—*Held*, that the existence of the promissory note did not debar H. from resorting to his original consideration, nor exclude evidence of the oral acknowledgment of the debt: *H. Lal v. Datadin* (I. L. R. 4 A. S. 135).

Where an unstamped promissory note is merely a collateral security a suit for money lent may be maintained independently thereof, and evidence of the consideration of the promise be given from other sources: *B. Prasad v. Maharaja of Betia* (I. L. R. 9 A. S. 351).

It is against good conscience that the obligee of a bond should stipulate that although he may have been paid in part or in full he should, if the evidence

were not in writing, be at liberty to treat the payment as a nullity. The Anglo-Indian Law of Evidence whilst not overlooking the absence of the writing—perhaps caused through the negligence or wrong of the obligee—admits oral testimony to the payments: *N. U. Patil v. M. Ramdas* (I. L. R. 1 B. S. 45).

A deed of partition was executed among three brothers, C., N., and B., on the 19th of March, 1867, but was not registered. It recited that some years previously to the date a division of the family property, with the exception of three houses, had been effected, and it purported to divide those houses amongst the brothers. In a suit brought by C.'s widow for the recovery of the house which fell to C.'s share:—*Held*, that though the deed did not include secondary evidence of the partition of the family property previously divided, yet it affected to dispose of the three houses by way of partition made on the day of its execution, and therefore secondary evidence of its contents was inadmissible: *Kachrubhai v. Krishnabai* (I. L. R. 2 B. S. 635).

See *Damodar v. Almaram* (12 B. S. 443, and note to section 64).

The document called a Sodi Razanama (whereby a party relinquishes his right of occupancy of land in his possession to his landlord, and requests the latter to register the land in the name of another party to whom it has been sold) is not a document of the kind mentioned, and therefore does not exclude the courts from basing their findings upon other evidence should

any such exist : *Venkatesa v. Sengoda* (I. L. R. 2 M. S. 117).

Evidence is not admissible to shew that after the execution of a bond the plaintiff stated that the clause was intended to operate as a penal clause and not as an agreement to pay liquidated damages, and that therefore the conditions ought to be relieved against : *B. L. Doss v. T. Narain*.

Paragraph 2 of section 19 of the Limitation Act, 1877, is not to be read in derogation of the general rules of secondary evidence so as to exclude the evidence of the contents of an acknowledgment which has been lost or destroyed : *S. N. Nath v. R. C. Shaha* (I. L. R. 12 C. S. 267).

The terms of a contract to repay a loan of money with interest having been settled and the money paid a promissory note later in the day containing the terms was given by the defendant to the plaintiff, but not stamped :—*Held*, that the plaintiff could not recover on the oral contract : *P. Reddi and Velayudasan* (I. L. R. 10 M. S. 94).

A suit was brought by a Mahomedan wife for dower alleged to be due to her under a kabinnamal executed by her husband at the time of her marriage. She alleged the amount to be Rs.10,000 of which 5000 were prompt and 5000 deferred. She claimed the whole in pursuance of a divorce contained in the kabinnamal which she had exercised. She failed to prove the kabinnamal. But the Court made a decree in her favour founded on oral evidence as to the usual

dower in the plaintiff's family:—*Held*, that no oral agreement being alleged in the plaint, nor admitted by the defendant, that the plaintiff was entitled to no decree: *R. M. Ashgur v. M. Khanum* (I. L. R. 14 C. S. 420).

Oral evidence of payments in part liquidation of a bond hypothecating immoveable property is admissible though the written receipts be inadmissible because unregistered under Act VIII. of 1871, s. 17: *D. Singh v. D. Prasad* (I. L. R. 1 A. S. 442).

In a suit before the passing of the Act to recover an over-payment of a mortgage claim, an unsigned and unregistered indorsement of such payment made by the mortgagee (defendant) on the registered mortgaged bond was tendered in evidence of payment:—*Held*, admissible as confirmatory evidence of the sum received: 7 M. H. C. R. 1.

Hindu wills not having been recognized by Hindu law do not fall within its strict rules as to handwriting or attestation to be found in Vyavahara Mayukha, ch. ii., 1, s. 5. Such a will is therefore not invalid because the text was not written by the testator himself, and because his signature is not attested: *Radhabai v. G. T. Gholap* (I. L. R. 3 B. S. 7).

Exclusion of
evidence of
oral agree-
ment.

92. When the terms of any such contract, grant, or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives

in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:—

Proviso (1).—Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or * failure of consideration, or mistake in fact or law.

Proviso (2).—The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

Proviso (3).—The existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant, or disposition of property may be proved.

Proviso (4).—The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant, or disposition of property, may be proved, except in cases in which such contract, grant, or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

Proviso (5).—Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved: Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

Proviso (6).—Any fact may be proved which shows in what manner the language of a document is related to existing facts.

* See Act No. XVIII. of 1872, section 8.

Illustrations.

(a.) A policy of insurance is effected on goods "in ships from Calcutta to London." The goods are shipped in a particular ship which is lost. The fact that that particular ship was orally excepted from the policy, cannot be proved.

(b.) A. agrees absolutely in writing to pay B. Rs. 1,000 on the 1st March, 1873. The fact that, at the same time, an oral agreement was made that the money should not be paid till the 31st March, cannot be proved.

(c.) An estate called "the Rámpur Tea Estate" is sold by a deed which contains the map of the property sold. The fact that land not included in the map had always been regarded as part of the estate and was meant to pass by the deed, cannot be proved.

(d.) A. enters into a written contract with B. to work certain mines, the property of B., upon certain terms. A. was induced to do so by a misrepresentation of B.'s as to their value. This fact may be proved.

(e.) A. institutes a suit against B. for the specific performance of a contract, and also prays that the contract may be reformed as to one of its provisions, as that provision was inserted in it by mistake. A. may prove that such a mistake was made as would by law entitle him to have the contract reformed.

(f.) A. orders goods of B. by a letter in which nothing is said as to the time of payment, and accepts the goods on delivery. B. sues A. for the price. A. may show that the goods were supplied on credit for a term still unexpired.

(g.) A. sells B. a horse and verbally warrants him sound. A. gives B. a paper in these words: "Bought of A. a horse for Rs. 500." B. may prove the verbal warranty.

(h.) A. hires lodgings of B., and gives B. a card, on which is written, "Rooms, Rs. 200 a month." A. may prove a verbal agreement that these terms were to include partial board.

A. hires lodgings of B. for a year, and a regularly stamped agreement, drawn up by an attorney, is made between them. It is silent on the subject of board. A. may not prove that board was included in the terms verbally.

(i.) A. applies to B. for a debt due to A. by sending a receipt for the money. B. keeps the receipt and does not send the money. In a suit for the amount, A. may prove this.

(j.) A. and B. make a contract in writing to take effect upon the

happening of a certain contingency. The writing is left with B., who sues A. upon it. A. may shew the circumstances under which it was delivered.

In proviso (1) for the words “want of failure,” are substituted “want or failure”: Act XVIII. of 1872, s. 8.

A contemporaneous oral agreement that the obligee of a bond should take possession of part of the hypothecated property and pay the instalments out of the rents, coupled with taking possession, is admissible in evidence: *R. Baksh v. Durjan* (I. L. R. 9 A. S. 392). An oral jemog or novation that the creditor shall take the rents of certain tenants in lieu of the interest, and that the debtor shall release the tenants, though subsequent, does not rescind or alter the contract, but takes away the plaintiff's right to recover interest: *A. Singh v. A. Sahue* (I. L. R. 9 A. S. 249).

The words “between the parties” do not preclude one of two persons in whose favour a deed of sale was made from proving orally that the other person paid no part of the money: *Mulchand v. M. Ram* (I. L. R. 10 A. S. 421).

Oral evidence wholly inconsistent with the document is inadmissible, as that contemporaneously with the execution of a deed of sale an oral agreement was made that it was to be only a security, and that a large portion of the sum secured had been already paid: *Banapa v. S. Jagivandas* (I. L. R. 1 B. S. 333).

A deed of sale described the consideration to be

Rs.100 in ready cash received; but the evidence showed that the consideration was an old bond for Rs.63-12, and Rs.36-40 in cash :—*Held*, that there was no real variance as to the statement in the deed, and the evidence as to the consideration: *Hukumchand v. Hirralal* (I. L. R. 3 B. S. 159).

A party, whether plaintiff or defendant, who sets up a contemporaneous oral agreement as shewing that an apparent sale was really a mortgage, ought not to start his case by offering direct parol evidence of such oral agreement. But if it appear clearly and unmistakeably from the conduct of the parties that the transaction has been treated by them as a mortgage, and not as a sale, parol evidence of the terms of the original oral agreement is then admissible: *Bakshu Lakshman v. G. Kanji* (I. L. R. 4 B. S. 594).

Proviso (1) seems large enough to let in evidence of such subsequent misconduct as in the view of a Court of Equity would amount to fraud, and entitle the grantor to a decree restraining the grantee from proceeding on his instrument. At any rate if the Specific Relief Act, 1877, s. 26, c. (c.), modifies this section, it is with the object of bringing it into conformity, as well as section 91, with the English doctrines of equity: S. C. See Griffith's Institutes of Equity, pp. 751-201.

A verbal agreement that a lessee should have an option to renew a lease for three years is inconsistent with the following clause: "If you mean me to vacate at the completion of the term you must give one

month's notice. In accordance therewith I will vacate and give up possession to you": *E. P. Mahomed v. C. S. De Vitre* (I. L. R. 11 B. S. 644).

An oral agreement adding another term to the consideration of a release by the executors of a partner in respect of past accounts, viz., the continuance of one anna share in the partnership, being not collateral, is not admissible: *Cowasji v. Burjonji* (I. L. R. 12 B. S. 335).

M., the manager of an indigo concern, joined the owners in executing a valid mortgage thereof and of the coming season's crop to A. and B.:—*Held*, that an oral agreement between M. and the manager of A. and B., that a first charge might be given on the crop to the plaintiffs, indigo-brokers, was inadmissible: *Moran v. M. Bibee* (I. L. R. 2 C. S. 58).

This section does not prevent a person proving that he is only an accommodation acceptor of a bill of exchange: *M. Pogose v. Bank of Bengal* (I. L. R. 3 C. S. 174).

Evidence to prove a contemporaneous oral stipulation varying, adding to, or subtracting from the terms of a written contract is inadmissible. Evidence of the acts and conduct of the parties must extend further in its object: *D. Paik v. K. Taridar* (I. L. R. 5 C. S. 300). Reading this section in connection with the second part of section 230 of the Contract Act:—*Semble*, that if on the face of a written contract an agent appears to be personally liable he cannot escape liability by evidence of the disclosure of the principal's

name apart from the contract: *S. Setty v. Heilgers* (I. L. R. 5 C. S. 72).

(1.) The question whether an unambiguous written contract for the sale and purchase of government paper, is a contract or agreement by way of wager, must be decided on the express terms of the contract itself, and parol evidence is not admissible to vary or contradict those terms: *J. S. Bux v. R. Dyal* (I. L. R. 9 C. S. 791). Oral evidence is admissible to prove that an apparent out-and-out sale by a kobala is a mortgage: *H. C. Soor v. K. C. Das* (I. L. R. 9 C. S. 528). The admission is to prevent fraud.

The rule admitting oral evidence to prevent fraud by a mortgagee who may appear to be an out-and-out purchaser, does not extend to an innocent purchaser without notice, buying from a person in possession of the title deeds and the ostensible owner of the property: *K. N. Dass v. H. Mookerjee* (I. L. R. 9 C. S. 898).

In a deed of mortgage executed on behalf of a minor by his guardian in favour of T. (who did not execute it) it was recited that the mortgage was made to secure the repayment of a certain sum to T. which he had undertaken to expend in liquidating certain sums due from the minor's estate, and among them a debt of K.'s. T. having failed to pay K. he obtained a decree against the minor's estate, and was paid by the guardian. In a suit brought on behalf of the minor to recover this sum from T., T. pleaded that it was orally agreed at the time of the mortgage

that he should have an indemnity either from K. or the minor's guardian before payment, against any repudiation by the minor on coming of age:—*Held*, reversing the decision of the District Court, that the evidence was admissible: *Tiruvengada v. Rangasami* (I. L. R. 7 M. S. 19).

A written agreement reciting that A. bought property benami for B. and would convey it to him, does not preclude A. from proving that he bought it for himself: *Kumara v. Srinavasa* (I. L. R. 11 M. S. 213).

When words used in the operative part of a deed are of doubtful import the recitals and other parts of the instrument will often form an excellent test for discovering the real intention of the parties, and will enable the Court to fix the true meaning of the language employed. Written words in an instrument are entitled to greater weight than words printed: *Jessel v. Bath* (L. R. 2 Ex. 267).

Where the words of a will are unambiguous they cannot be departed from, merely because they lead to consequences capricious, or harsh and unreasonable. But where they are capable of two interpretations, that construction of them is to be adopted which is in accordance with an intelligible and reasonable, and not a capricious or anomalous, result: *Bathurst v. Errington* (2 Ap. Cas. 698).

The principle of English law that a document sealed and delivered imports consideration, does not obtain amongst the Hindus: *R. Balu v. Krishnarav* (I. L. R. 2 B. S. 274).

To prove the fraudulent character of a transaction between the parties, oral evidence is admissible: *K. N. Chukerbati v. B. Chukerbati* (I. L. R. 10 C. S. 649). Griffith's *Institutes of Equity*, p. 128. This head of law is more fully considered in the notes to section 111, pp. 204-213. See also section 115 (on estoppel) and notes.

In *Leifchild's case* (L. R. 1 Eq. 231) it was held that the expression of a nominal consideration in a deed does not prevent the admission *aliunde* of the real consideration, provided such real consideration be not inconsistent with the deed.

See also *Peacock v. Monk* (1 Ves. Sen. 190).

If after a right of action accrues to a creditor against two or more persons he is informed that one of them is a surety only, and after that he gives time to the principal debtor without the consent and knowledge of the surety, the rule as to the discharge of the surety applies: *Liquidators of O. G. & Co. v. Liq. of Oriental Financial Corporation* (L. R. 7 H. L. 348).

In cases of mistake of fact the party seeking relief undertakes a task of great difficulty, for the Court will not interfere unless it be clearly convinced by the most conclusive evidence that the mistake complained of really exists, and next, that it is such a mistake as ought to be corrected: *MacCormack v. MacCormack* (I. L. R. 11 Eq. 130), *Welman v. Welman*, (15 Ch. D. 570), *Lovesey v. Smith* (15 Ch. D. 655). A plaintiff may seek the equitable relief by commencing an action to reform the writing in which it will be

necessary, except under special circumstances, to shew that this mistake was common to both sides, or an action to rescind the instrument in which, though conclusive proof of error or surprise on the plaintiffs' part alone will suffice, it must appear that the mistake was of vital importance. In either action the plaintiffs' case will be much assisted by some documentary evidence, such as the rough draft of the agreement or the written instructions to prepare it.

The English Court of Probate admitted parol evidence to prove that a will bearing date 27th February, 1855, was in fact executed in 1865, and had consequently revoked another will that was made in 1858: *Reffell v. Reffell* (L. R. 1. P. & D. 139).

(2.) A plea that though the consideration of a written agreement was fixed at Rs.2000, there was a separate oral agreement that out of that sum the plaintiff was to refund Rs.1000 on account of a debt due from his relative is good. And to prove such plea oral evidence is admissible under proviso 2; the stipulation to refund not being inconsistent with the recital as to the consideration of the written agreement: *L. H. S. Singh v. Leuchellen* (I. L. R. 11 C. S. 486).

In an action on a covenant in a mortgage deed for payment of principal and cost thereby secured, the defendant pleaded that the mortgage was executed on the terms that it should stand as a security for such sum only as might be found due by him to the plaintiff with whom he was engaged as co-partner, and that no partnership accounts had been settled or

balance taken :—*Held*, that letters between the parties were admissible to sustain the defence: *Trench v. Doran* (20 L. R. Ir. 338).

(3.) This proviso does not apply when the contract has become binding. “Any obligation” means any whatever, not some particular one, contained in the contract: *J. Misser v. N. Singh* (I. L. R. 6 C. S. 433).

A defendant claimed the property as preferential heir, and also set up an alleged alternative defence of an alleged oral agreement cancelling a registered deed of sale of property by her co-widow to the plaintiffs:—*Held*, that the agreement being not a resumption but a transfer of plaintiff's rights to the defendant was admissible: *Rakhmabai v. Tukaram* (I. L. R. 11 B. S. 47).

(4.) Clause (4) does not prohibit the disproof of a recital in a contract as to the consideration that has passed by showing that the actual consideration was different from that alleged: *Vasudeva v. Narasamma* (I. L. R. 5 M. S. 8).

A person who causes a building to be erected for viewing a public exhibition, and admits persons on payment of money to seats in the building, impliedly undertakes that due care has been exercised in the erection; and if in consequence of the careless or improper construction of the stand it falls, and the visitors sustain injury, he is liable to an action, though he may be personally free from negligence, and may have employed a competent builder: *Francis v. Cockrell* (L. R. 5 Q. B. 184, 501). But see *Searle*

v. Larerick (L. R. 9 Q. B. 122). The implication is a general one, and attaches to the use of any article supplied for valuable consideration for a certain purpose. So articles sold in commerce ought to be merchantable. The law also implies a contract in the absence of an express provision to deliver up the premises, that the tenant shall go out at the termination of the tenancy, and restore the absolute possession to the landlord : *Henderson v. Squire* (L. R. 4 Q. B. 170).

(5.) The responsibility of an underwriter for "general average" under an ordinary policy of assurance on ship and cargo may be limited by a custom of trade so as not to extend to the jettison of goods which have been stowed on deck : *Kidston v. E. M. Insurance Co.* (L. R. 2 C. P. 357).

The defendants who were hop-brokers gave to the plaintiffs a sold note in the following form :—"Sold by Ongley & Thornton to Messrs. Pike, Sons, & Co., for and on account of owner one hundred bales hops (Signed) for Ongley & Thornton, S. T." In an action for non-delivery of hops according to sample, the plaintiffs sought to make defendants personally liable on the above contract, and tendered evidence to show that by the custom of the hop trade, brokers who do not disclose the names of their principal at the time of making the contract are personally liable upon it as principals, although they contracted as brokers for a principal :—*Held* (reversing Q. B. D.), that the custom gave a remedy against the brokers as

well as against the principals, that it was not in contradiction of the written contract, and that evidence of the custom was properly admitted at the trial: *Pike v. Ongley* (18 Q. B. D. 708 ; 56 L. J. Q. B. 73).

(6.) The obligors of a bond for the payment of money describing themselves as “sons of R. Zemindar and Pattidar, resident of Manza, S.” hypothecated as collateral security for such payment their one Biswa five biswansi share:—*Held*, in a suit to enforce a charge on the five biswansi share, evidence might be given to show that the obligors hypothecated by the bond their share in Manza S.: *R. Lal v. Harrison* (I. L. R. 2 A. S. 832).

Exclusion of evidence to explain or amend ambiguous document.

93. When the language used in a document is, on its face, ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects.

Illustrations.

(a.) A. agrees, in writing, to sell a horse to B. for “Rs. 1000, or Rs. 1500.”

Evidence cannot be given to show which price was to be given.

(b.) A deed contains blanks. Evidence cannot be given of facts which would show how they were meant to be filled.

Certain persons describing themselves as residents of J. gave a bond for the payment of money in which as collateral security they charged their property with such payment. Evidence as to whether immovable property at J. is included was not admitted: *Deojit v. Pitambar* (I. L. R. 1 A. S. 275).

Exclusion of evidence against ap-

94. When language used in a document is plain in itself, and when it applies accurately to existing facts,

evidence may not be given to show that it was not meant to apply to such facts. plication of document to existing facts.

Illustration.

A. sells to B., by deed, "my estate at Rámpur containing 100 bighás." A. has an estate at Rámpur containing 100 bighás. Evidence may not be given of the fact that the estate meant to be sold was one situated at a different place and of a different size.

95. When language used in a document is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense. Evidence as to document unmeaning in reference to existing facts.

Illustration.

A. sells to B., by deed, "my house in Calcutta."

A. had no house in Calcutta, but it appears that he had a house at Howrah, of which B. had been in possession since the execution of the deed.

These facts may be proved to show that the deed related to the house at Howrah.

96. When the facts are such that the language used might have been meant to apply to any one, and could not have been meant to apply to more than one, of several persons or things, evidence may be given of facts which show which of those persons or things it was intended to apply to. Evidence as to application of language which can apply to one only of several persons.

Illustrations.

(a.) A. agrees to sell to B., for Rs. 1,000, "my white horse." A. has two white horses. Evidence may be given of facts which show which of them was meant.

(b.) A. agrees to accompany B. to Haidarábád. Evidence may be given of facts showing whether Haidarábád in the Dekkhan or Haidarábád in Sindh was meant.

97. When the language used applies partly to one set of existing facts, and partly to another set of existing Evidence as to application of language

to one of two
sets of facts,
to neither of
which the
whole
correctly
applies.

facts, but the whole of it does not apply correctly to either, evidence may be given to show to which of the two it was meant to apply.

Illustration.

A. agrees to sell to B. "my land at X. in the occupation of Y." A. has land at X., but not in the occupation of Y., and he has land in the occupation of Y., but it is not at X. Evidence may be given of facts showing which he meant to sell.

In an action on a policy of fire assurance, if the evidence disclose a latent ambiguity on the policy, so that it becomes necessary to go into the consideration of other documents, and to resort to parol evidence to solve that ambiguity, it ceases to be merely a question for the Court on the construction of the instrument, and raises a question of fact to be determined by the jury: *Hordern v. Commercial Union Insurance Co.* (56 L. J. P. C. 78).

Evidence as
to meaning
of illegible
characters, &c.

98. Evidence may be given to show the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, technical, local, and provincial expressions, of abbreviations and of words used in a peculiar sense.

Illustration.

A., a sculptor, agrees to sell to B. "all my mods." A. has both models and modelling tools. Evidence may be given to show which he meant to sell.

Who may
give evidence
of agreement
varying terms
of document.

99. Persons who are not parties to a document, or their representatives in interest, may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document.

Illustration.

A. and B. make a contract in writing that B. shall sell A. certain cotton, to be paid for on delivery. At the same time they make an oral agreement that three months' credit shall be given to A. This could not be shown as between A. and B., but it might be shown by C., if it affected his interests.

100. Nothing in this chapter contained shall be taken to affect any of the provisions of the Indian Succession Act (X. of 1865) as to the construction of wills.

Saving of provisions of Indian Succession Act relating to wills.

PART III.

PRODUCTION AND EFFECT OF EVIDENCE.

CHAPTER VII.

OF THE BURDEN OF PROOF.

The following rules have their foundations in principles of logic and natural reason. For every controversy ultimately resolves itself into this, that certain facts or propositions are asserted by one of the disputant parties which are denied, or at least not admitted, by the other. On all matters which are not the subject either of intuitive or sensitive knowledge, which are either not demonstrated or susceptible of demonstration, and which are not rendered probable by experience or reason, the mind suspends its assent until proof is adduced. Where effective proofs are in the power of a party who refuses or neglects to produce them, a presumption arises that if produced they would make against him.

Burden of proof.

101. Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any

fact, it is said that the burden of proof lies on that person.

Illustrations.

(a.) A. desires a Court to give judgment that B. shall be punished for a crime which A. says B. has committed.

A. must prove that B. has committed the crime.

(b.) A. desires a Court to give judgment that he is entitled to certain land in the possession of B., by reason of facts which he asserts, and which B. denies, to be true.

A. must prove the existence of those facts.

See as to fact bringing an offence within general or special exemption, Act XVIII. of 1862, s. 26; want of good faith in defamation, Act XVIII. of 1862, s. 27; reasonable cause for not giving information, Act X. of 1882, s. 44; Act XI. of 1878, s. 28; Factory Law, Act XV. of 1881, s. 16; European British subjects; Griffith's Code of Criminal Procedure Act X. of 1882, s. 453; Act III. of 1864, s. 2; Act IX. of 1874, s. 25.

A.D. 1862 the plaintiff brought a resumption suit against A. in respect of the lands in this case on the ground that she was holding them on an invalid lakheraj title, and obtained a decree. After the lapse of several years the plaintiff brought this present suit against B., who derived her title through A., to have the rent assessed. B. pleaded by way of bar to the jurisdiction that the lakheraj grant was made previously to 1790 :—*Held*, that the burden of proof lay on B.: *H. L. Pramānick v. B. Bibee* (I. L. R. 3 C. S. 501).

A boundary road is presumed to belong in moieties to the adjoining owners subject to the right of passage,

until one of the owners proves that he gave both halves: *M. Shah v. Toofany* (I. L. R. 4 C. S. 206).

On whom
burden of
proof lies.

102. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Illustrations.

(a.) A. sues B. for land of which B. is in possession, and which, as A. asserts, was left to A. by the will of C., B.'s father.

If no evidence were given on either side, B. would be entitled to retain his possession.

Therefore the burden of proof is on A.

(b.) A. sues B. for money due on a bond.

The execution of the bond is admitted, but B. says that it was obtained by fraud, which A. denies.

If no evidence were given on either side, A. would succeed, as the bond is not disputed and the fraud is not proved.

Therefore the burden of proof is on B.

In all suits in equity for an account both parties are deemed actors when the cause is before the court upon its merits. It is upon this ground that the party defendant contrary to the ordinary course of equity proceedings is entitled to orders in a cause to which a plaintiff alone is generally entitled. It is a general rule that no person but a plaintiff can entitle himself to a decree. But in bills for an account, if a balance is ultimately found in favour of the defendant, he is entitled to a decree for such balance against the plaintiff. And, for a like reason, though a defendant cannot ordinarily revive a suit which has not proceeded to a decree, yet in a bill for an account, if the plaintiff dies after an interlocutory decree to account, the defendant is entitled to revive the suit against the

personal representatives of the plaintiff. And, if the defendant dies, his personal representatives may revive the suit against the plaintiff. The good sense of the doctrine seems to be that wherever a defendant may derive a benefit from further proceedings, whether before or after a decree, he may be said to have an interest in it, and consequently ought to have a right to revive it. Griffith's *Institutes of Equity* (p. 122); Story (section 522).

See *N. Bhikabhai v. Dipa Umed* (I. L. R. 3 B. S. 3), cited under section 13.

When a will duly signed and attested is impugned on probate on the ground of the testator's insanity, the burden of proof lies on the impugner; when, however, it is shown that the testator was insane or subject to delusions at any time prior to the date of the will, or within a few years after that date, the burden of establishing his capacity to have made the will in question, is shifted on to the propounding party: *Smee v. Smee* (L. R. 5 P. D. 84); *Prinsep v. Dyce Sombre* (10 M. P. C. 232).

This general test includes the following:—"Would a party fail if a particular allegation to be proved were struck out?" If so the burden rests upon him: *Mills v. Barber* (1 M. & W. 247).

A.D. 1876, January 18, plaintiff became a purchaser at a court sale of the right, title, and interest of G. and N. in a shop, and having been obstructed by defendant in obtaining possession of it, sued to recover it from him. The plaint was filed A.D. 1877,

January 27, defendant answered that he purchased it under a deed of sale from G. bearing date 1865, January 5, and that he had been in possession since that day. It was found that he had been in possession from that date, but that the deed had not been registered:—*Held*, that as the defendant admitted that he had derived his title from G., of whose interest the plaintiff was assignee, the burden of proving his purchase lay upon the defendant, and that his deed being unregistered, and oral evidence being inadmissible in place thereof, he had failed so to do: *S. Kar-sandas v. S. Sadashivdas* (I. L. R. 4 B. S. 89). But a document containing covenants for title to immovable property, if it conform to the exceptive clauses of Registration Act, s. 17, is admissible though unregistered in an action for damages for their breach: *R. Balu v. K. Ramchandu* (I. L. R. 2 B. S. 273).

The burden of proving that the vatandar joshi of a village is not entitled to officiate and take fees in the family of any particular caste lies upon the person or persons asserting exemption: *R. V. Shivapa v. Krishnabhat* (I. L. R. 3 B. S. 232).

Where a plaintiff proved the right of his succession to a Math on the death of a Mahant, the burden of proving that his subsequent marriage worked a forfeiture of his office, and its appendant property and rights, lay upon the defendant, who impugned the plaintiff's right on account of the marriage: *G. R. Jag-rupbharti v. M. Surajbharti* (I. L. R. 5 B. S. 682).

In cases to which the Dekkan Agriculturists Relief

Act XVII. of 1879 applies, where a suit is brought upon a bond, the execution of which is admitted by the defendant, no strict rule can be laid down as to the party upon which the burden of proof rests. If the court cannot satisfy itself as to the amount of principal or interest, it may refer it to arbitration: *M. Santaji v. V. Hari* (I. L. R. 9 B. S. 520). This results from the nature of accounts, in a suit for which equity considers both parties plaintiffs

Where shipping documents provide that freight shall be payable on the intake measure, the burden of proving what the intake measure actually was lies upon a plaintiff who seeks to recover back money paid in excess. In the absence of such proof the bill of lading is *prima facie* evidence: *C. R. Setna v. T. Williams* (I. L. R. 5 B. S. 313).

The defendant having attached certain property belonging to his judgment debtor B., the plaintiff applied for an order removing the attachment, and alleged that she had purchased the property from B prior to the defendant's decree. The order was refused. She then brought a suit for the same purpose:—*Held*, that the burden was on her of proving the purchase and possession afterwards: *G. Atmaram v. Santai* (I. L. R. 12 B. S. 270).

A mortgagee alleging priority against a *bonâ fide* purchaser for value may be put to prove both execution and *bona fides*: *B. Peshakar v. Budhanuddi* (I. L. R. 6 C. S. 268).

If a damage suit for collision be instituted in

Admiralty, and the defendant making no charge of negligence against the plaintiff denies his averments and pleads inevitable accident, the plaintiff on the trial must begin: *The Benmore* (4 L. R. Adm. & Ecc. 132); *The Otter* (S. V. 203).

The burden of proving division of family property and self acquisition is not sufficiently discharged by showing that the two branches of the family were trading separately, and that certain items of the property were acquired in the names of members of the branch of the family to which plaintiff's husband belonged: *D. P. Pandey v. M. S. Dibiah* followed (3 Moo. I. A. 229). *Védavalli v. Náráyana* (I. L. R. 2 M. S. 19).

Burden of proof as to particular fact.

103. The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Illustration.

A. prosecutes B. for theft, and wishes the Court to believe that B. admitted the theft to C. A. must prove the admission.

B. wishes the Court to believe that, at the time in question, he was elsewhere. He must prove it.

See *Smee v. Smee* (L. R. 5 P. D. 84), in note to s. 102.

Burden of proving fact to be proved to make evidence admissible.

104. The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

Illustrations.

(a.) A. wishes to prove a dying declaration by B. A. must prove B.'s death.

(b.) A. wishes to prove, by secondary evidence, the contents of a lost document.

A. must prove that the document has been lost.

For an instance of a dying declaration being received in evidence, without previous evidence that the party examined was in immediate apprehension of death, see 6 S. T. 1325.

For the principles upon which dying declarations are admitted in cases of murder, see 16 S. T. 24, note.

It is a question for the Court, and not for the jury, whether the person whose declaration is offered in evidence was conscious at the time he made it of his danger: 16 S. T. 27, note.

The *London Gazette* is evidence of all acts of state, and the production of it is sufficient to prove that certain addresses were presented to the king for his reception of them in his public capacity, makes them acts of state: *Holt's Case* (21 S. T. 1213).

Notice in the *Gazette* of the ratification of treaties of peace with a foreign country, held to be evidence of the existence of peace with that country: *Quelch's Case* (14 S. T. 1084).

105. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or

Burden of proving that case of accused comes within exceptions.

in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.

Illustrations.

(a.) A., accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act.

The burden of proof is on A.

(b.) A., accused of murder, alleges that, by grave and sudden provocation, he was deprived of the power of self-control.

The burden of proof is on A.

(c.) Section three hundred and twenty-five of the Indian Penal Code provides that whoever, except in the case provided for by section three hundred and thirty-five, voluntarily causes grievous hurt, shall be subject to certain punishments.

A. is charged with voluntarily causing grievous hurt under section three hundred and twenty-five.

The burden of proving the circumstances bringing the case under section three hundred and thirty-five lies on A.

If a statute in the direct description of an offence, and not by way of proviso, contain negative matter, the charge should also contain a negative allegation, which must in general be supported by *prima facie* evidence: *Copley v. Burton* (L. R. 5 C. P. 489).

It will be necessary for a party who wishes to excuse himself for an act of apparent defamation to show that it comes within one of the ten exceptions: (1) of the public good; (2) criticism of public conduct of public servants; (3) conduct respecting public questions; (4) reports of courts of justice; (5) merits of a decided case and conduct of witnesses; (6) merits of a public performance; (7) lawful censure by one in authority; (8) legal accusation in good faith; (9) protection of one's own interests; (10) cautions (I. P. C.

s. 499). A person indicted for taking coining tools out of mint "without lawful authority," will have to show lawful authority: section 245. But an act of culpable homicide being charged as murder, it will rest upon the prosecution to prove some one of the three provisos which takes the case out of exception 1 of section 300. For the history of the procedure, see *I. M. P. S. P. Pandah* (I. L. R. 4 C. S. 124).

106. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Burden of proving fact especially within knowledge.

Illustrations.

(a.) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b.) A. is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

If a document on which a case depends appears to have been altered, it cannot be received in evidence, or be acted on till it is most satisfactorily proved by all the subscribing witnesses at the least, and by other evidence that the alteration was made before the signature was made: *T. Manickjee v. M. Manickjee* (1 M. I. A. 420).

In a suit to enforce pre-emption, in which the plaintiff disputes the correctness of the price stated in the instrument of sale, although the burden of proof is *primâ facie* upon him, to show that the property has in fact been sold below the value stated, yet very

slight evidence is ordinarily sufficient to establish his case, and afterwards it rests upon the defendants to show by cogent evidence that the stated price is the correct one: *R. K. D. R. Panday v. N. B. Singh* (L. R. 3 I. A. 85) applied; *B. Singh v. M. Singh* (I. L. R. 5 A. S. 184).

Burden of proving death of person known to have been alive within thirty years.

107. When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

The administrator of a person who had not been heard of since A.D. 1873, had in his hands a sum of money belonging to the intestate. Inquiries in chambers fixed the persons who would have been the next of kin if he died in 1873, or if in 1880 respectively:—*Held*, that neither class had established a title to the fund, and that the case must go back to chambers for further inquiry: *J. R. Rhodes* (36 Ch. D. 586).

Plaintiffs having insured the life interest of one H. with the defendant insurance company for the better security of certain advances to H., and H. not having been heard of for seven years:—*Held*, that H. must be taken to be dead, and that the plaintiffs were entitled to the amount of the life policy and bonuses: *Willyams v. Scottish Widows* (52 J. P. 471).

This and the next section do not lay down any rule as to the exact time of death of a missing person. Whenever the question as to the exact time of death

arises, it must be dealt with according to the evidence and circumstances of each case: *D. Nath v. G. Saran* (I. L. R. 8 A. S. 614).

108. * Provided that, when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is *shifted to the person who affirms it.

Burden of
proving that
person is alive
who has not
been heard
of for seven
years.

A wife in the reasonable belief that her husband was dead, though he had not been absent seven years married a second time:—*Hell*, that as there was no guilty intention, she was not guilty of bigamy: *Q. v. Tolson* (for C. C. R., May 11, 1889; 5 T. L. R. 465).

It is to be remarked that the presumption only relates to the fact of death, the time of death whenever it is material must be a subject of distinct proof: *Doe v. Nepean* (5 B. & Ad. 56). The true proposition is that those who found a right upon a person having survived a particular period must establish the fact affirmatively by evidence. The evidence will necessarily vary in different cases, but sufficient evidence there must be, or the person asserting title will fail: *Phene's Trusts* (L. R. 5 Ch. 139 (reversing James's, V.C., decision), Giffard, L.C.).

Before the word "when," insert the words "provided that," for the word "on" substitute "shifted to:" Act XVIII. of 1872, s. 9.

The reversioners next after J. to the estate of S.,

* See Act No. XVIII of 1872, section 9.

deceased, sued to avoid an alienation of S.'s estate affecting their reversionary right made by the widow. J. had not been heard of for eight or nine years, and there was no proof that he was alive:—*Held*, that his death might be presumed for the purposes of the suit, although in a suit for the purpose of administering the estate the Court might have to apply the Hindu law of succession prescribed when a person is missing and not dead: *P. Rai v. B. Singh* (I. L. R. 1 A. S. 53).

A suit to enforce a right to a Mohamedan heritage must be decided according to the Mohamedan law relating to missing persons: *H. Ali v. Mahrbar* (I. L. R. 2 A. S. 625). But see *M. Ali v. B. Singh*.

This rule governs the case of a Mohamedan who has been missing for more than seven years, when the question of his death arises in cases to which, under the Bengal Civil Courts Act, the Mohamedan law is applicable. Per Mahmood, J. The rule of that law that a missing person is to be regarded as alive till the lapse of ninety years from the date of his birth is a rule of evidence not of "succession, inheritance, marriage, or caste, or of any religious usage or institution within the Bengal Act, s. 24": *M. Ali v. B. Singh* (I. L. R. 7 A. S. 297).

The same principle holds in the case of a Hindu widow: *Balayya and Kisenappe* (I. L. R. 11 M. S. 448).

D. G. and B. were owners of certain koti villages. B. disappeared and was unheard of for more than seven years. Meanwhile D. received his share of the rents and profits. G. brought a suit against D. for a

moiety:—*Held*, that the question being one of evidence, and not depending on the law of inheritance, that he was entitled to succeed: *D. Bhikaji v. G. Bhikaji* (I. L. R. 11 B. S. 433).

109. When the question is whether persons are partners, landlord and tenant, or principal and agent, and it has been shown that they have been acting as such, the burden of proving that they do not stand, or have ceased to stand, to each other in those relationships respectively, is on the person who affirms it.

Burden of proof as to relationship in the cases of partners, landlord and tenant, principal and agent.

A Hindu family once joint is presumed to retain such status unless evidence be produced to show its division: *M. Cheetha v. B. M. Lall* (11 Moore, Ind. App. 369.) When a business is carried on by partners after the expiration of the time limited by the articles, such of the provisions of the articles as are not inconsistent with a partnership at will are presumed to remain in force: *Cox v. Willoughby* (13 Ch. D. 863).

110. When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.

Burden of proof as to ownership.

Where a person is alleged to be in possession not as owner of the full proprietary right but as mortgagee, the burden of proof of such qualified ownership lies on the party asserting it: *S. Gir v. Doorga* (6 R. H. C. N. W. P. 36).

Possession by mortgagees for thirty-four years, though they admitted the ancestral title of the plaintiffs

was held to throw upon the plaintiffs the burden of proving the mortgage of a part which the defendants alleged had been sold to them: *V. N. Gopalar v. N. Chetti* (10 M. I. A. 151) followed; *R. Kuar v. J. Singh* (I. L. R. 1 A. S. 194).

Possession is a good title against all persons except the rightful owner, and entitles the possessor to maintain ejectment against any other person than such owner who dispossesses him. The rule applies where plaintiff, relying both on conveyance and possession, fails to prove his title under the conveyance, but proves his possession: *P. Bhavaniram v. N. S. Khisti* (I. L. R. 6 B. S. 215). A plaintiff in an ejectment suit claiming land from which he alleges that he has been dispossessed must prove possession and dispossession within twelve years, or at least that the cause of action arose within twelve years. Dictum of the Privy Council in *R. G. Roy v. Inglis* not followed. *Moro Desai v. R. Desai* (I. L. R. 6 B. S. 508).

“The question whether a plaintiff in ejectment is entitled to succeed upon mere proof of antecedent undisturbed possession in himself is one upon which the judges of this [the Calcutta] Court are perhaps not quite unanimous in their opinions”: *J. Dassee v. M. Mobaruck* (I. L. R. 982), Field, J. See also 10 M. I. A. 528; I. L. R. 1 A. S. 194.

Possession of land is *primâ facie* evidence of a complete title, and a plaintiff who alleges that a defendant is merely a mortgagee is bound to prove his own title as mortgagor clearly and indefeasibly. Mere

statements that the property has been mortgaged, which fail to establish any particular mortgage, do not shift the burden of proof or require the mortgagee to show what were the terms of such mortgages on his right to obtain possession thereunder: *R. Apáji v. B. Bháuráv* (I. L. R. 9 B. S. 137).

For purposes of limitation of occupied land the possession is dealt with separately from that of title. But where the land is unoccupied and uninhabited slight evidence of occupation or of occupation of adjoining land coupled with evidence of title, such as grants or leases, may raise a presumption that a party with title has also the possession: *M. C. D. Sírcar v. H. L. Sírcar* (I. L. R. 3 C. S. 768).

June, A.D. 1878, the plaintiff sued the defendant for the recovery of possession of certain land. At the trial it was proved that he had been continuously in possession until May, 1878, when he was forcibly and illegally dispossessed by the defendant:—*Held*, that the evidence was sufficient to call upon the defendant to show his title: *M. P. Singh v. M. Singh* (I. L. R. 7 C. S. 591).

When the affirmant has proved his case the burden of disproving it then rests on the person in possession: *Milakandan v. Thaudamma*, R. (I. L. R. 9 M. S. 462).

The production by the plaintiff of an I. O. U. signed by the defendant but not addressed to any one is usually sufficient proof not of money lent, of which it is no evidence at all, but of an account stated between

the parties: *Wilson v. Wilson* (14 C. B. 616). A letter with the address gone or even torn off, is presumed on the first blush to belong to the person producing it: *Curtis v. Rickards* (1 M. & Gr. 47).

Armory v. Delamirie rules that the finder of property is, as against strangers, the owner: 1 Strange, 504. ✓

Proof of good faith in transactions where one party is in relation of active confidence.

111. Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence.

Illustrations.

(a.) The good faith of a sale by a client to an attorney is in question in a suit brought by the client. The burden of proving the good faith of the transaction is on the attorney.

(b.) The good faith of a sale by a son just come of age to a father is in question in a suit brought by the son. The burden of proving the good faith of the transaction is on the father.

Mr. Griffith, in his 'Institutes of English Equity,' says (p. 191): "During the last few years there have been several cases in which the ignorance of the poor and the weakness of old age have been held sufficient grounds for setting aside sales of property at an inadequate price, usually a small annuity. The absence of independent legal advice is a most important element.

Inadequacy of price or of interest sold is, in the absence of distress, mistake, or fraud, no ground for cancelling a conveyance; and where the price of a reversionary or contingent interest is reasonable at

the time of the contract, though totally inadequate on the accruing of the event, the vendor can enforce his contract in equity.

Still persons dealing with reversionary interests, and heirs dealing with expectancies, are very likely to be imposed upon; the Court, therefore, throws upon the purchaser the necessity of proving, if the transaction be impeached, the reasonableness of the price. In *Edwards v. Burt* (2 D. M. & G. 56), the Court of Appeal in Chancery refused to act on the opinion of an actuary. Vice-Chancellor Stuart considered this decision (*Willoughby v. Brideoake*, J. (65), 524), as opposed to the understanding of every lawyer and man of common sense. Cambridge mathematicians and London actuaries may perhaps agree with this opinion; but rules founded on average may, as remarked by Lord Cottenham (*Aldbrough v. Trye*, 7 Cl. & F. 436), apply with great injustice in a variety of individual cases. The life may be an extraordinarily good or an extraordinarily bad one. Thus we find insurance offices testing each life by a special medical examination. Still all that is required is a fair or reasonable price, but no price can with safety be considered reasonable which was not given at a properly conducted public auction. In all cases evidence of the *bona fides* should be preserved. It has been enacted in England by 31 Vict. c. 4—(1) That no purchase made *bonâ fide*, and without fraud or unfair dealing, of any reversionary interest in real or personal estate, shall hereafter be opened or set

aside merely on the ground of undervalue ; (2) That the word “purchase” in this Act shall include any kind of contract, conveyance, or agreement under or by which the beneficial interest in any kind of property may be acquired. This Act is not mentioned in the Indian Government Index.

In post-obit securities not only is there likely to be weakness on the one side, and usury on the other, but also extortion or advantage taken of that weakness;—and with these there frequently concur deceit and illusion on other persons not privy to the fraudulent agreement. The father, ancestor, or relation, from whom was the expectation of the estate, has been kept in the dark; the heir or expectant has been kept from disclosing his circumstances, and resorting to them for advice which might have tended to his relief and also reformation; this misleads the ancestor who has been seduced to leave his estate, not to his heir or family, but to a set of artful persons who have divided the spoil beforehand (Lord Hardwicke, *Chesterfield v. Janssen*, 2 Ves. S. 125). In *King v. Hamlet* (3 Cl. & F. 218), Lord Chancellor Brougham held that fraud on the person *in loco parentis* was essential to relief. Lord St. Leonards does not agree with this position, thinking such fraud to be only an important circumstance on grounds of public policy in the son’s equity. In the recent case of *Webster v. Cook* (2 C. A. 546), Lord Chancellor Chelmsford said: “The policy of the law, which throws its protection round all reversioners, may be

questionable, and has been questioned, and the principle ought not to be extended by analogy.”

Where a trust or confidence as to full disclosure is reposed by the surety in a creditor, as in insurance cases, so in cases of suretyship, the most fruitful good faith is requisite, according to some authorities. On an appeal, in *Owen v. Homan*, to the House of Lords, Lord Cranworth said: “Without saying that in every case a creditor is bound to inquire under what circumstances the principal debtor obtained the concurrence of the surety, it may safely be stated that if the dealings are such as fairly to lead a reasonable man to conclude that fraud has been used in order to obtain such a concurrence he is bound to make inquiry” In some cases wilful ignorance is not to be distinguished in its consequences from knowledge.

Seeing that mortgagors are usually in pecuniary difficulties, that they may owe a long arrear of interest, that they often are small traders struggling under debts which they are unable to pay, and in the power of any creditor who uses pressure, the Equity Courts view a lease or a sale of the equity of redemption by a mortgagee to the mortgagor with jealousy. It has been laid down by the editor of a valuable text book (Powell on Mortgages) without sufficient qualification, that a mortgagee may purchase from the mortgagor his equity of redemption. Lord Redesdale, in the case of *Webb v. Rorke* (2 Sch. & Lef. 661), says that the Courts view transactions between mort-

gagor and mortgagee with considerable jealousy, and will set aside the sale of the equity of redemption where, by the influence of his position, the mortgagee has purchased for less than others would have given, and where there are circumstances of misconduct in obtaining the purchase. In the case of *Hickes v. Cooke* in the House of Lords (4 Dow. 16), it was said that a lease obtained by the mortgagee from the mortgagor was more objectionable than the purchase of the entire equity of redemption. It is clearly laid down by Lord Eldon in that case, that the taking of a lease from the mortgagor by the mortgagee is objectionable. Why is a lease from a mortgagor to a mortgagee liable to be impeached, and a sale of the mortgaged property to be treated as a transaction which is unimpeachable? The same objection seems to exist as to both transactions. A mortgagee may be a man of wealth, and in a situation to make any contract he pleases with the mortgagor; but the principle upon which the Courts act is not that the mortgagor is unable to enter into a contract of this kind, but that the transaction ought to be looked upon with jealousy, especially when the mortgagor is a needy man, and when there is pressure and inequality of position, and the sale has been at an undervalue (Vice-Chancellor Stuart, *Ford v. Olden*, 3 E. C. 463).

In the case before us, the mortgagor having become bankrupt, the deed conveying the equity of redemption was set aside at suit of the creditors' assignee.

Marital Rights.

· “The law,” said Lord Chancellor Thurlow (*Countess of Strathmore v. Bowes*, 1 Ves. jun. 22), “conveys the marital rights to the husband, because it charges him with all the burthens which are the consideration he pays for them; therefore it is a right upon which fraud may be committed.” The present Master of the Rolls, in *Chambers v. Crabbe* (J. (65), 277), quoted with approval the rule laid down in Roper on Husband and Wife, that “deception is inferred, if after the commencement of the treaty for marriage, the wife attempted to make any disposition of her property without her intended husband’s knowledge.” At one time it was supposed that such a settlement by a widow upon her children by a former marriage was good. This is not borne out by recent authority (*Downes v. Jennings*, M. R., J. (63), 1264). Both in England and in India the principle rather than the actual decrees in the last three cited cases is of importance.

We now proceed to consider fraud in particular relationships involving confidence. This, in many books, is considered under the head of voluntary gifts. But it may affect purchases of estates at inadequate prices or mortgages to secure bills which were never due.

In our book on the Indian Trusts Act, we said that a court of equity will not render any assistance to render effectual a voluntary gift unless as a trust.

We shall now see that a voluntary gift, complete so far as formalities are concerned, frequently will be set aside in equity on the ground of undue influence exercised by the donee over the donor.

A voluntary gift may be made to a friend or relation, who stands not in any confidential relationship, as to an attorney. In such a case, unless there is actual fraud, the gift is valid. In *Cooke v. Lamotte* (15 Beav. 234), however, Sir J. Romilly, departing somewhat from the ruling of Lord Brougham in *Hunter v. Atkyns* (3 My. & K. 113), considered that the *onus probandi*, that the donor knew what he was doing, lay on the donee, while in confidential relationships the additional onus was imposed of shewing how the intention of the donor was produced; the Court from the relation inferring the probability of the abuse of the influence. Such are the relations of counsel, religious director, guardian, parent, trustee or attorney.

Religious Director.

The case of the religious director seems to be as old as the days of the scribes and pharisees, who devoured widows' houses. The instances in our law reports are not numerous. One of the most remarkable, as well as most useful, for its clear statement of the law, is *Nottidge v. Prince* (J. (60), 1067). Louisa J. Nottidge, in 1845, went to reside at W., in order to be near the defendant, and to place herself under his religious teachings. The defendant had held two curacies in the Church of England, but had been deprived of his

licences on the ground of irregularities, and, subsequently to such deprivation, had become the head of the Agapemone, in which establishment Miss Nottidge and three of her sisters had become residents. She was taken from the Agapemone, and upon medical certificate placed in a lunatic asylum, but after eighteen months was liberated by the commissioners in lunacy, who certified that she was still of unsound mind on the subject of religion, but had no other indications of insanity; also that her bodily health was giving way, and might be seriously injured by prolonged confinement. The delusion was that the tabernacle of God was upon earth; that Prince the defendant was that tabernacle; and that the spirit of God dwelt in him, his original spirit being extinct. Immediately after her release from the asylum she returned to the Agapemone, and shortly afterwards transferred a sum of £3 per cent. annuities (the whole of her property) into the defendant's name, but, as alleged by the defendant, without solicitation on his part and without his knowledge.

In delivering his judgment, Vice-Chancellor Stuart said—"Where a gift is made under the influence of delusion or deception, it cannot be valid. Whether the delusion relates to matters spiritual or matters temporal is immaterial. The strength of religious influence is far beyond that of gratitude to a guardian, trustee, or attorney, and the same ground of public utility which requires this Court to guard against such influences has its most important application to that

influence which is the strongest. In Roman Catholic countries, where spiritual influence has its highest dominion, public feeling has required the interposition of an absolute and imperative check. The law of France, as stated by M. Pothier, absolutely prohibits not only all gifts by a penitent to his confessor, but all gifts to that religious community of which the confessor is a member."

The decree made was to the effect that the stock be transferred to the plaintiff, as the legal personal representative of Miss Louisa Jane Nottidge, and that all the dividends which had accrued due on it since her death be paid to the plaintiff.

In *Metcalfe's Will* (J. (61), 287), where E. became a nun, and went into a convent in France, and assigned all her property to trustees for the benefit of a Roman Catholic congregation, the Lords Justices held that she was not *civiliter mortua*, so that she was incapacitated from dealing with her property; and differing herein from the Master of the Rolls that the relationship did not create a presumption of undue influence, and accordingly that trustees of a will under which she claimed were not justified in paying the fund into court, but that on her petition payment out was to be made according to her wishes to trustees for the congregation. In the judgment of Lord Justice Bruce occurs the following passage:—"To say that a lady is not to deal with her property, because, though in the full possession of her senses, she is supposed, and perhaps supposed with great probability, to be under

an influence which will direct her to the application of it in a manner which those, who have to adjudicate upon the case, may think unwise—to suppose therefore that she is not to be trusted with her property is to act with a view of the powers of English courts of justice which I do not think that they possess.”

Guardian and Ward.

This relationship gives the guardian an advantage over his ward in three ways: (1) In the confidence which a young and unsuspecting person places in apparent integrity; (2) In superior general and special knowledge; (3) In the influence which may be derived from improper indulgence. For each of these reasons, as well as on the ground of public utility, to prevent improper indulgence, purchases and gifts, while the relationship or its influence continues, are set aside. The general doctrine is succinctly summed up by Lord Chancellor Eldon in *Hatch v. Hatch* (9 Vesey, 292, cited by V.-C. S.). “The case proved,” said the Lord Chancellor, “the wisdom of the Court in saying it is almost impossible in the course of the connexion of guardian and ward, attorney and client, trustee and *cestui que trust*, that a transaction shall stand purporting to be bounty for the execution of antecedent duty. There may not be a more moral act, one that would do more credit to a young man beginning the world, or afford a better omen for the future, than if a trustee having done his duty, the *cestui que trust*, taking it into his fair, serious and well-informed consideration,

were to do an act of bounty like this. But the Court cannot permit it, except quite satisfied that the act is of that nature for the reason often given, and recollecting that in discussing whether it is an act of rational consideration, an act of pure volition uninfluenced, that inquiry is so easily baffled in a court of justice, that instead of the spontaneous act of a friend uninfluenced, it may be the impulse of a mind misled by undue kindness or forced by oppression."

Gifts from children to parents are looked upon in the same light (*Davies v. Davies*, V.-C. S., J. (63), 1002). Gifts contrary to the intention of a deed creating powers are deemed fraudulent. Cases involving such gifts must not be confused with family settlements or arrangements, nor with those cases in which the courts allow property given to the children, and for their maintenance, to be paid to poor parents.

And so Lord Justice Turner, in *Baker v. Bradley* (7 D. M. & G. 597; cited in *Chambers v. Crabbe*, by M. R. J. (65), 277), laid down the rule that on a child coming of age, if he or she makes a settlement of his or her property for the benefit of the family, in which the father or mother gets no benefit at all, the Court will not inquire into the degree of influence, but consider it for the benefit of the family; but if it is tainted with the slightest advantage to the parent, who induces the child to enter into the transaction, the whole thing is bad, unless it can be proved not merely that the child knew what the

transaction was, but that she was in no respect influenced by the peculiar relation in which they stood to each other.

Lastly. All contracts which are a fraud on the provisions of an Act of Parliament or upon any rule of common law, such as any which infringe on the policy of any Act touching bankrupts, or any which involves champerty or restraint of trade, &c., are in equity either void or voidable if due diligence is used. (For the common law doctrines of illegal contracts the student and practitioner are referred to the Indian Contract Act IX. of 1872, ss. 23, 24.) Equity considers contracts with guardians to facilitate marriage, and contracts or conditions in general restraint of marriage, also void.

For an able discussion of 13 Eliz. c. 5, passed to protect creditors, and of 27 Eliz. c. 4, passed to protect purchasers, the student is referred to the notes on *Twyne's case*, in the first volume of *Smith's selection*. *Twyne's case* is useful for its enumeration of circumstances indicating fraud.

As an instance of relief given against a fraud on a statute, though not expressly forbidden thereby, we cite *Cowen's case* (2 Ch. Ap. 563). The Bankruptcy Act, 1862, s. 192, empowers a certain majority of creditors in number and amount of debts assenting to a deed of arrangement to bind those non-assenting.

Lord Justice Cairns in his judgment said: "In my opinion there is a statutory power given to the majority of the creditors to bind the minority. They

are made the judges of the propriety of the arrangement so long as they exercise their power *bonâ fide*, and it certainly seems to me that it would be contrary to the spirit of the Act that this court should sit in review on their decision as regards the quantum of composition they agree to accept. But this is subject to the paramount obligation that this power, like all other powers, must be exercised fairly, so that there may be a *bonâ fide* bargain between the creditors and the debtor. If it should be found that the bargain was tainted with fraud, the arrangement will not be binding on the non-assenting creditors. If, for example, it were found that there was a bargain with some of the creditors to give them some peculiar benefit, that would be a fraud. But even without any ingredient of fraud, if the creditors, from motives of charity and benevolence which might be highly honourable to them, were willing to give the debtor a discharge on payment of a composition wholly disproportioned to his assets, that would not be such a bargain as the Act requires, and would not bind the non-assenting minority."

If a decree has been obtained by fraud it may be impeached by original bill, without the leave of the court (Lord Redesdale, p. 92), the fraud used in obtaining the decree being the principal point in issue, and necessary to be established by proof before the propriety of the decree can be investigated. And where a decree has been so obtained, the court will restore the parties to their former situation, whatever

their rights may be. Besides cases of direct fraud in obtaining a decree, it seems to have been considered that where a decree has been made against a trustee, the *cestui que trust* not being before the court, and the trust not discovered, or against a person who has made some conveyance or incumbrance not discovered, or where a decree has been made in favour of or against an heir, when the ancestor has in fact disposed by will of the subject-matter of the suit, the concealment of the trust or subsequent conveyance, or incumbrance or will, in these several cases, ought to be treated as a fraud. It has been also said that where an improper decree has been made against an infant without actual fraud, it ought to be impeached by original bill.

A suit was compromised with the sanction of the Master (*Brooke v. Mostyn*, J. (64), 1114; Griffith's *Institutes of Equity*, pp. 192-200), who was of opinion that the compromise would be for the benefit of one of the plaintiffs, an infant. On a bill subsequently filed by the infant, the Lords Justices set aside the compromise, on the ground that the defendant, who had made one of two affidavits used before the Master, as to the value of the property, the subject of the compromise, had not produced the report of the surveyor, on which that value was made out.

Some of the doctrines enunciated and elaborated in the previous note have received legislative sanction under and by virtue of the Indian Specific Relief Act.

Where persons are exercising legal powers such as those of compulsory purchase, or of dealing with the surface under a mining lease, the burden of proving bad faith rests on the impugners of the exercise thereof: *James v. Lovel* (56 L. T. 735; 35 W. R. 326).

Birth during marriage, conclusive proof of legitimacy.

112. The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

Under Hindu law it is not necessary in order to render a child legitimate that the procreation as well as the birth should take place after marriage: *O. Chetty v. Arbuthnot*, P. C. (14 B. L. R. 116). A Mahomedan child born out of wedlock becomes legitimate by acknowledgment (11 Suth. 426).

This section in many cases probably works injustice and may encourage crime. H. Y., who made his will, and died March A.D. 1875, gave the residue of his personal estate after the death of his daughter A. (described as the wife of W. A.) in trust for all or any of her children who should attain twenty-one or marry. The daughter died in April, 1876, without having made an appointment. On petition by one child, who claimed to be the only legitimate child of A., the evidence of A.'s husband showing that three

children of A. born during the marriage were illegitimate was admitted by Hall, V.C., who held the petitioner to be the only person entitled to the fund: 5 Ch. D. 545.

In England the presumption in favour of the legitimacy of a child born in wedlock may be rebutted by cogent evidence. The wife's conduct tending to show that she regarded the child as the offspring of her paramour is admissible (*Moons v. Davis* (5 Cl. & F. Lyndhurst)) followed: *Bosvill v. A.-G.* (12 P. & D. 177).

113. A notification in the *Gazette of India* that any portion of British territory has been ceded to any native state, prince, or ruler, shall be conclusive proof that a valid cession of such territory took place at the date mentioned in such notification. Proof of cession of territory.

This section, though not disallowed, is not protected by 24 & 25 Vict. c. 67, s. 24, and is *ultra vires*: *D. Ghordan v. G. Derram* (10 B. H. C. R. 37). The Governor-General in Council being precluded by 24 & 25 Vict. c. 67, s. 22, from legislating directly as to the sovereignty or dominion of the Crown over any part of its territory in India, or as to the allegiance of British subjects, this section is invalid: *D. Ghordan v. D. Kanji* (I. L. R. 1 B. S. 367).

114. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case. Court may presume existence of certain facts.

Illustrations.

The Court may presume—

(a.) That a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession ;

(b.) That an accomplice is unworthy of credit, unless he is corroborated in material particulars ;

(c.) That a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration ;

(d.) That a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or states of things usually cease to exist, is still in existence ;

(e.) That judicial and official acts have been regularly performed ;

(f.) That the common course of business has been followed in particular cases ;

(g.) That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it ;

(h.) That if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him ;

(i.) That when a document creating an obligation is in the hands of the obligor, the obligation has been discharged.

But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it :—

As to illustration (a)—A shopkeeper has in his till a marked rupee soon after it was stolen, and cannot account for its possession specifically, but is continually receiving rupees in the course of his business :

As to illustration (b)—A., a person of the highest character, is tried for causing a man's death by an act of negligence in arranging certain machinery. B., a person of equally good character, who also took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of A. and himself :

As to illustration (b)—A crime is committed by several persons. A., B. and C., three of the criminals, are captured on the spot and kept apart from each other. Each gives an account of the crime

implicating D., and the accounts corroborate each other in such a manner as to render previous concert highly improbable :

As to illustration (c)—A., the drawer of a bill of exchange, was a man of business. B., the acceptor, was a young and ignorant person, completely under A.'s influence :

As to illustration (d)—It is proved that a river ran in a certain course five years ago, but it is known that there have been floods since that time which might change its course :

As to illustration (e)—A judicial act, the regularity of which is in question, was performed under exceptional circumstances :

As to illustration (f).—The question is, whether a letter was received. It is shown to have been posted, but the usual course of the post was interrupted by disturbances :

As to illustration (g)—A man refuses to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family :

As to illustration (h)—A man refuses to answer a question which he is not compelled by law to answer, but the answer to it might cause loss to him in matters unconnected with the matter in relation to which it is asked :

As to illustration (i)—A bond is in possession of the obligor, but the circumstances of the case are such that he may have stolen it.

Conclusive presumptions in the old law books are termed *presumptiones juris et de jure* ; disputable *presumptiones juris*. Presumptions or inferences of fact differ from the foregoing in not being the mere creation of the law. They are, in truth, but mere arguments of which the major premiss is not a rule of law. They belong equally to any and to every subject-matter, and are to be judged by the common and received tests of the truth of propositions and validity of arguments. They depend upon their own natural efficacy in generating belief as derived from those connections which are shown by experience irrespec-

plaintiffs or defendants: *Chowdrani v. T. K. L. Chowdry* (I. L. R. 8 C. S. 545).

For example, the provocation contemplated by I. P. C., s. 300, should be of a character to deprive a manslayer of his self-control in committing the alleged murder. In determining whether it was so it is admissible to take into account the condition of mind in which the offender was at the time of provocation: *E. v. Khogayi* (I. L. R. 2 M. S. 122).

Both in criminal and civil cases a person is liable for what is done by his servants or agents under his presumed authority. This presumption rebuts the general one of innocence: *R. v. Stephens* (L. R. 1 Q. B. 702); *Mullins v. Collins* (L. R. 9 Q. B. 292); *Betts v. De Vitre* (L. R. 3 Ch. Ap. 429); but see *Dickinson v. Fletcher* (L. R. 9 C. P. 1). Respecting publishers of newspapers, see *R. v. Holbrook* (4 Q. B. D. 42); libel, privileged communication, and actual malice: *Clark v. Molyneux* (3 Q. B. D. 237).

The owner of a several fishery when the terms of the grant are unknown may be presumed to be owner of the soil. The law presumes that the soil of unnavigable rivers to the middle line of the water together with the right of fishing, but not the right of abridging the width or interfering with the course of the stream belongs to the owner of the adjacent land: *Beckett v. Morris* (L. R. 1 H. L. Sc. 47); *Crossley v. Lightowler* (L. R. 2 Ch. Ap. 478). The king's right to put a fresh river above the flow of the tide in defence, that is, to reserve the fishing for himself, which

was restricted by Magna Charta seems to have been purely personal, and not the matter for a grant to a subject: *Duke of Devonshire v. Pattinson* (20 Q. B. D. 263). In navigable rivers and arms of the sea the presumption is that the soil is vested in the crown and the fishery public. A tenement fronting the sea gives the proprietor the same right of access which a riparian proprietor possesses: *A. G. of Straits Settlement v. Wemyss* (13 App. Cas. 192). Land which is covered by the medium high tide between the spring and the neap in the absence of proof of title belongs to the Crown; that part of the shore which is overflowed only at spring tide to the owner of the adjoining soil. The presumptions as to riparian ownership do not apply to great non-tidal lakes, whether or not navigable: *Bristow v. Cormican* (3 App. Cas. 641).

The Admiralty Courts presume in cases of collision that when one vessel is shown to have been at anchor the case is so far in its favour as to throw on the other vessel the necessity of defending itself: *The Bothnia* (Lush, Adm. Rep. 52).

On proof that a letter was properly directed and posted in England, the presumption arises that it reached its destination at the regular time and was duly received by the addressee: *J. R. Hickey* (Taylor, s. 180); *Wall's Case* (L. R. 15 Eq. 18).

When a will traced to the possession of a testator and last seen in his custody is not forthcoming on his death the ordinary presumption is that he destroyed

it with the intention of cancellation, unless there be sufficient evidence to rebut it: *Sugden v. Lord St. Leonards* (1 P. D. 154).

Where a contract to discharge or deliver goods or other contract has left the time of performance undefined the law presumes the promise to refer to a reasonable time: *Ford v. Cotesworth* (L. R. 5 Q. B. 544); *Postlethwaite v. Freeland* (5 App. Cas. 599).

Though no impression of sealing appear on the parchment or paper, still if the instrument be a deed in purport, and on proper stamps, and be stated in the attestation clause to have been duly sealed and delivered it will in the absence of evidence to the contrary, and especially if it be an ancient instrument, be presumed to have been sealed: *Sugden's Powers*, 232: *In re Sandilands* (L. R. 6 C. P. 411). A man is presumed to know the contents of a deed which he executes: *I. R. Cooper* (20 Ch. D. 611).

One presumption, for example, that of innocence, may be met by another presumption, and may or may not be neutralised. Thus on a trial for bigamy where a woman had married again only four years after she had been separated from her first husband, the judge held that the law would not presume the continuance of his life, but that the question of his being alive at the date of the second marriage was an open fact: *R. v. Lumley* (L. R. 1 C. C. 196); *R. v. Willshire* (6 Q. B. D. 366).

When secondary evidence is tendered to prove the contents of an instrument which is either lost or

retained by the opposite party after notice to produce it, the Court may presume that the original was duly stamped, unless some evidence to the contrary, as that it was unstamped when last seen, can be given: *Marine Investment Company v. Havaside* (L. R. 5 H. L. 624).

If no evidence be produced as to which of two deeds of even date was first executed the Court presumes in favour of that order of priority which will best support the clear intents of the parties: *Gartside v. Silkstone* (21 Ch. D. 702).

The fact that a woman is living in notorious adultery is, though of course it amounts to very strong evidence, not in itself quite sufficient to repel the presumption of the legitimacy of children then born: *Hawes v. Draeger* (23 Ch. D. 173).

A person is presumed to retain his domicile until the intention and fact of acquiring a new one is shown.

The deposition of a medical witness taken by a committing magistrate under Griffith's Crim. P. C. s. 509, must either appear by the record or be proved by witnesses to have been taken in the presence of the accused: *Q. E. v. Riding* (I. L. R. 9 A. S. 720); *Q. E. v. P. Singh* (I. L. R. 10 A. S. 174).

To allege without proving the destruction or loss of documents brings the alleger within the presumption (g): *R. Prasad v. R. Prasad* (I. L. R. 7 A. S. 738).

The most learned writer on presumptions is Memohius, "*De Præsumptionibus conjecturis signis et indicis*,"

tam Civilibus quam Canonicis.” The work exhibits great learning and great acumen, and is well arranged. But as it treats of all branches of the law which obtained in Europe during the middle or dark ages, the students thereof must be careful to separate the seed from the husk.

CHAPTER VIII.

ESTOPPEL.

The Statute law renders conclusive certain pieces of evidence which may be classed under five heads (1) Notifications, declarations, and orders of Government; (2) certificates, statements, &c., by public officers; (3) awards and orders by public officers; (4) registers and records; (5) miscellaneous.

(1.) The notifications, declarations and orders of Government so made conclusive evidence relate to the Criminal Tribes, seamen being distressed, jurisdiction in foreign States and delegation thereof, waste land taken up for State forests, land needed for public purposes, enactments in force or not in force in scheduled districts, boundaries of scheduled districts, settlement in progress, summary settlement, forfeiture of vernacular newspapers, &c., for sedition, &c., and boundaries of Assam frontier tracts.

(2.) The public officers whose certificates and statements are so made, are political agent as to summons being served; revenue officer as to arrear and defaulter; immigration agent as to expense of redeeming contract; labour inspector; registrar of joint stock companies; municipal commissioner as to tramway default

works ; collector of impounded instrument as to stamps ; magistrate as to proclamation, and collector as to certificate of sale for arrears of land revenue. The Merchant Shipping Law contains many special rules of evidence relating to the Secretary of State, the Governor-General, naval courts, official logs, consuls, &c.

(3.) The awards and orders are those by court of contributory's debt ; High Court reciting lunacy, minority, &c., of trustee or mortgagee ; High Court as to membership, &c., of religious society ; shipping master of legal rights of parties to award ; collector under the Land Acquisition Act as to value, boundary office ; compensation orders for water taken for canal ; probate and letters of administration as to title ; sentences on Europeans and Americans in certain cases ; mutiny ; conviction as to certain facts, and convictions involving forfeiture.

(4.) The registers and records relate to marriages of native Christians, rights in certain cases, Oudh talukdars and grantees of status, Chuttra Nagpur tenures, rents of privileged occupants. Such evidence is usually given in the form of a certified copy : see section 79.

(5.) The miscellaneous are declaration by chairman of company's general meeting as to votes, evidence given on special form of oath, and bill of lading to some extent against the master of a ship.

This chapter does not, and was not intended to include estoppels by deed or by record, but only those which are technically called estoppels in *pais* :

Stephen's *Digest*, Preface. Though the narrow scope of this chapter is to be regretted, yet a man can be estopped not only from giving particular evidence, but from doing any act or relying upon any particular argument or contention which the rules of equity and good conscience prevent him from using as against his opponent: *The Ganges Manufacturing Company v. Sourinmuth* (I. L. R. 5 C. S. 669).

115. When one person has, by his declaration, act, or Estoppel. omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

Illustration.

A. intentionally and falsely leads B. to believe that certain land belongs to A., and thereby induces B. to buy and pay for it.

The land afterwards becomes the property of A., and A. seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title.

An estoppel is not readily created where the person seeking to take advantage thereof is acquainted with the illegality of the transaction: *Durga v. Jhinguri* (I. L. R. 7 A. S. 511); *Jhinguri v. Durga* (S. V. 878). The questions in these cases arose out of a transfer of occupancy rights involved under Contract Act, ss. 2 and 23, and s. 9 of Act XVII. of 1873.

D., who was the natural brother of H., but had been adopted into another family, on the one part, and G. on the other part, submitted to arbitration a dispute

between them concerning the succession to the estate of S., the father of H. and D. H. having been born deaf and dumb was under the Hindu law incapable of inheriting his father's estate, and was not a party to the arbitration proceedings. The award, to which after it was made G. expressed his consent in writing, declared that H. was heir of the father's estate:—*Held* (Spankie, J., dissenting), in a suit by H. against G. for a possession of part of the father's estate, that the plaintiff not being a party to the award was not bound thereby, and therefore could not take advantage of it. That it could not confer a right not possessed by law upon him nor constitute evidence thereof, and that the defendant had not made a gift to the plaintiff of what did not belong to the defendant, and that the defendant was not estopped by his assent and by this section from questioning the plaintiff's right of inheritance: *G. Sahai v. A. Singh* (I. L. R. 2 A. S. 809).

Bidding at an execution sale does not stop a prior decreeholder from maintaining a suit for a declaration that the share which he purchased at the prior sale was not affected by a sale in execution of a subsequent decree. It is neither a waiver of title nor an equitable encouragement to the defendant to purchase: *R. S. Ram v. K. Deiss* (N. W. P. H. C. 1868); *A. Singh v. F. Singh* (8 C. S. 346), and *E. Salano v. R. Lall* (7 C. S. 481), distinguished: *Gheran v. K. Behari* (I. L. R. 9 A. S. 413).

When conduct fall short of a legal estoppel it still

may be proved and considered, for example as in cases of fraud or part performance : *B. Lakshman v. G. Kanji* (I.-L. R. 4 B. S. 594).

In the case of an intervening defendant who resisted a claim for rent on the ground that he was owner, as mortgagee from A., who had successfully resisted a similar claim by the plaintiff as his superior landlord, on the ground that he had parted with his estate to B. and C., the intervener was held to be estopped : *A. N. Deb v. B. C. Roy* (I. L. R. 4 C. S. 783).

“Intentionally” is less comprehensive than “wilfully,” the word used in *Pickford v. Sears* (6 A. & E. 409); *Freeman v. Cooke* (2 Ex. 651). “Wilfully” seems used as nearly synonymous with “wrongfully.”

A recital in a deed or other instrument, being a statement deliberately made, is in some cases conclusive, and in all cases evidence between the parties who made it. But it is no more evidence against third persons than any other statements would be : *B. Peshakar v. Budhanuddi* (I. L. R. 6 C. S. 268).

The declaration contemplated refers to belief in a fact, not in a proposition of law : *R. Bose v. Universal Life Assurance Co.* (I. L. R. 7 C. S. 594).

A suit for rent by a zamindar and patnidar against a darpatnidar was defeated by the defence of the latter that he had conveyed his interest to others, against whom the former afterwards obtained a decree, and brought the darpatni to sale in execution, buying their

right, title, and interest therein themselves. From the darpatnidar who had thus disclaimed title, a third party claimed to be mortgagee, and set up a decree on his mortgage, followed by a purchase of the tenure at a sale in execution. He was thereupon allowed to intervene in a suit for rent brought by the zamindar and patnidar against an yarardar of lands within the darpatni estate:—*Held*, that notwithstanding this purchase, the intervening mortgagee was bound by the estoppel arising out of the mortgagor's disclaimer of title in the suit above mentioned: *P. Mukerji v. A. Deb* (P. C., I. L. R. 9 C. S. 265).

In the absence of title by grant or prescription in persons alleging themselves to be holders of a julkur, under an ijara, the mere payment of rent by fishermen to former ijaradars does not estop such fishermen from disputing the rights of such alleged holders. Yet such payment for the use of the julkur rights is strong evidence of the rights of the alleged holders of the ijara, and of acquiescence in their title. Per Prinsep and Pigott, JJ.: Unless the boundaries given in a grant of a julkur clearly indicate to the contrary, the grant would not ordinarily include the right of a fishery in a tidal navigable river: *H. D. Mal Ap. v. M. Jaki* (R., I. L. R. 11 C. S. 434). For a statement of the law relating to fisheries, see Griffith's *Indian Easements Act*, 1882, pp. 5-9, 29-31.

A purchaser at a sale on execution is not as such a representative of the judgment debtor: *L. P. Lal v. J. Mylne* (I. L. R. 14 C. S. 401).

Acquiescence to have the effect of an admission by way of estoppel must exhibit some act of the mind, and amount to voluntary demeanour or conduct of the party. And whether it be acquiescence in the conduct or in the language of others, it must plainly appear that such conduct was fully known, or such language fully understood by the party, before any inference can be drawn from his passiveness or silence. The circumstances, too, must be such not only to afford him an opportunity to act or to speak, but such also as would properly or naturally call for some action or reply from men similarly situated. Thus, where a landlord quietly suffers a tenant to expend money in making alterations or improvements on the premises, it is evidence of his consent to the alterations : *Bickett v. Morris* (L. R. 1 H. L. Sc. 57 ; Griffith's Institutes, p. 117).

But the mere lying by and passively witnessing the breach of a covenant for several years is not such an acquiescence as amounts to a waiver of the forfeiture : *Perry v. Davis* (3 C. B. N. S. 769).

Receipts or mere acknowledgments given for goods or money whether on separate papers or endorsed on deeds or on negotiable securities, bankers' pass books, the adjustment of a loss on a policy of insurance made without full knowledge of all the circumstances, or under a mistake of law or fact, or under any other invalidating circumstances and accounts rendered, such as a solicitor's bill, are not conclusive : *Lee v. Lancashire and Yorkshire Rail-*

way (L. R. 6 Ch. App. 527). Taylor on Evidence, s. 859.

As between parties to a deed and in an action on it, even a married woman is bound by a recital containing a distinct statement of a particular fact: *I. R. Fidley* (L. R. 7 Ch. App. 773).

If the owner of an instrument which purports to be transferable by delivery deposits it with his broker or banker, he will be estopped as against a *bonâ fide* holder for value from denying that it was transferable: *Goodwin v. Roberts* (L. R. 1 App. Cas. 476); *Rumball v. Metropolitan Bank* (2 Ex. D. 194). The doctrine of estoppel or admission also applies to the respective relations of licensor and licensee, bailor and bailee, and principal and agent: *Clark v. Adie* (2 App. Cas. 423); *Knights v. Whiffen* (L. R. 5 Q. B. 60) and Broom's Commentaries.

When there has been no opportunity for pleading the matter of estoppel in bar, it seems on principle that an estoppel by record or by deed ought to be binding when offered in evidence, but the point has not yet been expressly decided in England: *R. v. Hutchins* (6 Q. B. D. 300).

An estoppel binding a person in one capacity will not necessarily bind him when acting in another capacity for other persons: *Robinson's Case* (5 Rep. 326); *Leggott v. Great N. Railway* (12 Q. B. D. 599).

The doctrine of estoppel by representation is applicable only to representations as to some states of

facts alleged at the time to be actually in existence and not to promises, definitions, oral or written, which if binding at all must be binding as contracts: *Jorden v. Money* (5 H. L. Cas. 185); *Maddison v. Alderson* (31 W. R. 821; 8 App. Cas. 473). This ruling is illustrated by *Gillman & Spencer, Limited, v. Garbutt & Co.* (37 W. R. 437). F., a broker, purported to sell to unnamed principals for the defendants 1000 bags of rice, which, on a subsequent day, he purported to buy for the plaintiffs. Neither the defendants nor the plaintiffs had notice of F.'s dealings with the other parties, and neither the defendants nor plaintiffs had instructed F. to act as their agent. F. then obtained from the defendants, who were both merchants and wharfingers, a delivery order addressed to the superintendent of defendants' wharf for delivery of the rice to the plaintiffs. The plaintiffs, on receipt of the delivery order, paid part of the price to F., who absconded without paying the defendants:—*Held* (affirming the decision of Huddleston, B.), that the defendants were not estopped from denying the title of the plaintiffs by the delivery order, and that the plaintiffs had no cause of action against them: Esher, M.R., Fry, and Lopes, L.JJ. See also *McEwan v. Smith* (2 H. L. Cas. 325) in which Lord Cottenham distinguished a delivery order from a bill of lading. It seems, however, open to argument that where one of two innocent persons must suffer he who causes the loss ought to suffer it.

Negligence will not produce an estoppel unless it be the proximate cause of the loss. The directors of a company left the corporate seal in the custody of a clerk, who sold out stock belonging to the company inscribed in the books of the Bank of England, and appropriated the proceeds:—*Held*, that the company might recover from the Bank: *Mayor, &c., of Merchants of Staple of England v. Governor and Company of Bank of England* (C. A. 21 Q. B. D. 160).

Estoppel of
tenant;

and of license
of person in
possession.

116. No tenant of immovable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the license of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such license was given.

The words “at the beginning of the tenancy” only apply to cases in which tenants are put into possession of the tenancy by the person to whom they have attorned. Wherefore A., a ryot, who was in possession of a certain holding, and executed a kabuliat in favour of B., who claimed the land under a derivative title from the last holder, and paid the rent to B., was not estopped: *L. Mahomed v. Kallannus* (I. L. R. 11 C. S. 519).

Respecting licenses, see Griffith's Easements Act, pp. 93–106.

Except in a clear case of fraud, the only course which a tenant can pursue who wishes to dispute the title of a landlord under whom he entered is to yield up the premises and then bring an action to recover them: *Cooke v. Loxley* (5 T. R. 4); *Doe v. Wiggins* (4 Q. B. 367); *Morton v. Woods* (L. R. 3 Q. B. 658, 4 Q. B. 293). And the tenant cannot give a better title than he possesses: *Doe v. Mills* (2 A. & E. 17).

A lessee who has once received a lease and paid rent under it cannot gainsay the lessor's title, though the deed itself admits upon its face some infirmity of title: *Morton v. Woods* (L. R. 4 Q. B. 293).

One who has once been a tenant is not debarred from contending that the title of his landlord has been lost, or that his tenancy has determined: *Amnu v. R. Sastri* (I. L. R. 2 M. S. 226).

Non-payment of rent for upwards of twelve years, and a grant of patta by Government to defendant for five years, do not, when Government claims no interest adverse to plaintiff, and plaintiff does not consent to defendant becoming tenant to the Government, create any possession in defendant adverse to his former landlord the plaintiff: *J. P. Nulan v. Sanguvien* (I. L. R. 3 M. S. 118).

117. No acceptor of a bill of exchange shall be permitted to deny that the drawer had authority to draw such bill or to endorse it; nor shall any bailee or licensee be permitted to deny that his bailor or licensor had, at the time when the bailment or license commenced, authority to make such bailment or grant such license. Estoppel of acceptor of bill of exchange, bailee or licensee.

Explanation (1).—The acceptor of a bill of exchange may deny that the bill was really drawn by the person by whom it purports to have been drawn.

Explanation (2).—If a bailee delivers the goods bailed to a person other than the bailor, he may prove that such person had a right to them as against the bailor.

CHAPTER IX.

OF WITNESSES.

The human faculties enable their possessor to acquire a knowledge of facts by accurate observation and reasoning, by the bodily senses and mental reflection, and to impart to others by the use of accurate expressions the knowledge so acquired.

“The wise and beneficent author of nature who intended that we should be social creatures, and that we should receive the greatest and most important part of our knowledge by the information of others, hath for these purposes implanted in our nature two principles that tally with each other. The first of these principles is a propensity to speak truth, and to use the signs of language so as to convey our real sentiments.” “Another original principle implanted in us by the Supreme Being is a disposition to confide in the veracity of others, and to believe what they tell us. This is the counterpart to the former, and as that may be called the principle of veracity, we shall for want of a proper name call this the principle of credulity. It is unlimited in children until they meet with instances of deceit and falsehood, and it retains a very considerable degree of

strength through life. If nature had left the mind of the speaker *in equilibrio* without any inclination to the side of truth more than to that of falsehood, children would lie as often as they speak truth, until reason was so far ripened as to suggest the imprudence of lying, or conscience as to suggest its immorality. And if nature had left the mind of the hearer *in equilibrio* without any inclination to the side of belief more than to that of disbelief, we should take no man's word until we had positive evidence that he spoke the truth": Reid on the Human Mind (c. 6, s. 21). The same conclusions may be arrived at from comparing the number of trials for perjury with that of other trials and legal proceedings. The number of the former is far smaller than that of the latter.

The facts in issue between parties in a trial are either directly attested by those who speak from their own actual or personal knowledge in affirmation or denial of the existence of a fact, or its existence or non-existence is to be inferred from other facts satisfactorily proved. In the latter case, as the proof applies merely to collateral facts supposed to have a connection near or remote with the fact primarily in issue, it is called not direct but circumstantial, and sometimes, but not with entire accuracy, presumptive. A. saw B. stab C. with a sword. A.'s testimony would be direct. A. testifies that B. was shot with a pistol, and that the wadding of the pistol was found to be part of a letter, the rest of which was found in C.'s pocket. A.'s testimony is direct, but the evidence is

circumstantial, and the jury may or may not infer guilt from the said circumstances coupled with other facts or circumstances. Whether there is a connection between the circumstances and the fact in controversy is to be solved by general knowledge and experience. This is merely the legal application of a process familiar to natural philosophy, showing the truth of an hypothesis by its coincidence with natural phenomena. The connections and coincidences may be either physical or moral. The knowledge of them is derived from the known laws of matter and motion, from animal instincts, and from the physical, intellectual and moral constitution and habits of men. Few events happen by chance. Most are intimately connected with others happening in the same or another place contemporaneously, previously, or subsequently, as complete or partial causes and effects. Circumstantial evidence must not be confused with that presumption of truth which arises from undesigned coincidences in the testimonies of independent witnesses, and which is of weight altogether apart from the character of the witnesses; nor must it be confused with, though it is akin to that presumption of truth called probability, which arises from the facts testified being in accordance with facts previously known or believed.

The attendance as witness in a civil court of a prisoner in a mufassil or presidency jail may be obtained by virtue of Act XV. of 1869; and in a criminal court, even if he be in another province: S. A. He

may be examined on commission for a civil court whether confined in the same or another province: S. A. A coroner may order a prisoner's attendance: Act IV. of 1871, s. 17. As to the power of a presidency magistrate, see Griffith's *Criminal Procedure Code*, Act X. of 1882, s. 542.

As to the issue of commissions for the examination of witnesses in proceedings for winding up a joint stock company: see Griffith's *Companies*, Act VI. of 1882; in other civil cases, Griffith's *Civil Procedure Code*, Act XIV. of 1882; in criminal cases, Griffith's *Criminal Procedure Code*, Act X. of 1882.

The Indian Evidence Act, useful as it is in respect of the competency, examination, and privileges of witnesses as to not answering, is altogether silent as to the number required in certain cases, and as to the enforcing of their attendance in litigious proceedings. Mr. Justice Stephen in his edition of the Act, A.D. 1872, states that this last omission was designed. He has not supplied the omission in his notes. As to their attendance in civil proceedings, Griffith's *Civil Procedure Code*, Act XIV. of 1882, may be consulted; in criminal proceedings the *Criminal Procedure Code*, Act X. of 1882, by the same author.

As might be expected, revenue officers, collectors, settlement officers, Imám commissioners, forest settlement officers, the Court of Wards, managers of encumbered estates, canal officers, auditors of accounts of administrator-general, commissioners of inquiry into conduct of public servants, labour inspectors, the

Màmlaldar's Court, &c., are empowered by various regulations and statutes to order the attendance of witnesses.

Two witnesses are required to prove the corruption of a village munsif; at the attestation of entries in marriage register book; to be present at every Christian marriage. Three are required to marriage of persons not professing certain specified religions: Act III. of 1872, ss. 10, 11, and 13. Two are sufficient for the attestation of unprivileged English wills: Indian Succession Act X. of 1865, s. 50.

Witnesses cannot be sued for damages in respect of evidence given by them in a judicial proceeding. If their evidence be false they should be proceeded against by an indictment for perjury: *P. C., B. D. G. Singh v. M. Chowdhry* (11 B. L. R. 320).

In valuing facts as a material for legal judgments the credit due to a witness to the facts is an essential and all important item. The ground of credit is credibility. Credibility is a conformity or congruity to or with truth, logical or moral. Logical truth is the conformity of a proposition with the actual statement of a case. Moral truth is that which the speaker trows, trusts, or conscientiously believes, and is opposed to a lie. Witnesses are morally credible where their peculiar interests do not intervene, because (1) the mind of human beings possesses generally a bent to speak the truth. (2) It requires an effort to invent a falsehood. (3) Many, if not most persons, regard an oath piously. (4) Shame or fear of punishment deter even

the callous. (5) The judges say that perjury is rare, that it requires a strong motive.

The evidence of children, which that of most uneducated persons resembles in some respects, calls for notice. A child is quick to see and hear. Its perception is untrained. It is easily beguiled, biased, influenced, or intimidated. It is unaware of the consequences of its statements to parties; and is usually artless.

The motives of a witness may be, and usually are, the source of suspicion as to his credit. Such are that the testimony will redound to the advantage of the witness; that he is bribed, or expects to be; that he is actuated by envy, spite, revenge, or seeks to shift the punishment from himself; and that he is influenced by relationship or friendship.

In cross-examination the barrister has the best opportunity for displaying his skill. For the previous life of the witness is open to scrutiny. And this within certain limits is fair. For many habits become a second nature, and he that is filthy continues filthy still, he that is unrighteous unrighteous still, and he that is a thief a thief still. In all cases variations from previous statements or depositions require explanation. According to Chief Justice Tindal on the trial of Frost the Chartist, a political offender, accomplices often make out a stronger case against the prisoner, and for themselves, than the truth will warrant.

The accomplished advocate knows that characters

deteriorate. The natural characters of children are made worse by the crimes and offences of their parents according to the Mosaic code, even to the third and fourth generations. But repentance and change of habits produce amendment.

Witnesses must be classified. Scholastically considered that of accomplices well deserves study. "Tis conscience makes cowards of us all," is the sententious remark of the master poet of nature. A man may not fear to commit one offence, yet fear the higher one of perjury. But a murderer or traitor will probably not scruple to commit perjury. Hope of pardon is consistent with contrition; temptation to invent evidence less, because it involves himself in the guilt which contaminates him. But hope of pardon or reward as a motive taints the evidence. And even amongst accomplices there frequently is ill will. These remarks may be illustrated by references to the State Trials, viz., to that of *Colling, Reid, and Others*, by Chief Justice Ellenborough, A.D. 1803, and to that of *Forbes and Others*, in Dublin, A.D. 1823, and to the *Parnell Commission*, A.D. 1888 and 1889. We ourselves heard Delaney, the alleged Invincible, tell the Commissioners that he had saved the life of Mr. Justice Lawson, and that his confederates intended to assassinate the whole of the Irish Executive. A spy is an hypocritical accomplice. He may be a watchman for the purpose of getting evidence, or a former confederate intending to leave the confederacy. The trial of Hardy, A.D. 1794, in which Erskine displayed his unrivalled talents.

is worthy of perusal with respect to this class of witnesses. So also is that of Colonel Despard, A.D. 1803. The watchman employing what the Roman jurists called *dolus bonus* may or may not be honest. But the mercenary employed for private purposes is one who will haunt society, act the bully, treacherously insinuate himself into the confidence of others; listen at doors or thin partitions, or any way play the eaves-dropper; peep through key-holes, and climb ladders to look into the window. The hireling hears and sees more than the reality, distorts and colours. For talents wrongly employed and for spiteful revenge, perhaps the chief place in the temple of infamy ought to be given to Titus Oates.

The civil law of Justinian makes perjury in a capital case itself a capital offence. Some think that the English law abstains from so doing in order that witnesses may not be deterred: *R. v. Macdaniel* (1 Leach, 52; 3 Institutes, 48; Foster, 13).

As to some other classes, our remarks must be brief, but on that account they may be more weighty. Bankrupts, except in the manufacture of votes to obtain a discharge, are not necessarily bad witnesses. It is said that there is no natural alliance between insolvency and impiety, between decayed fortune and perjury. The antithesis is pointed and not altogether free from truth. Another part of the truth is that poverty is a temptation to lie where something is to be gained thereby. "Give me neither poverty nor riches," was the prayer of the rich man,

and Juvenal could emphasise the difficulty, *Verum pertusâ dicere lænâ*. A bankrupt may be honest yet weak-minded, and weakness of mind causes a failure of right perception or a memory not very tenacious to lead into error. Sailors and superstitious persons are frequently weak-minded. Touching the demeanour of a witness, Bacon's Essay on Boldness contains a useful sentence. "In bashfulness the spirits do a little come and go, but with bold men, on a like occasion, they stand at a stay like a stale at chess where it is no mate, and yet the game cannot stir." Usually the mind retreats within itself to find an answer. Should one's own witness exhibit composure in so doing, it is good. Peasants and others in the lower walks of general society do not adapt accurately their thoughts to objects, or words to their thoughts, and many will say what they will not swear. In the present day the employment of intellectual power to browbeat, insult, or bewilder an honest witness, would be at once stopped by the Court. In most cases a quiet, gentle, and straightforward, but full and careful examination is the best means of eliciting the truth. The rule is for the Court to leave a witness in the hands of counsel who will do wisely to balance any inexperience of his own with greater caution.

"At cross-examination, the most difficult and by far the most hazardous part of a barrister's profession, Curran was inimitable. There was no plan which he did not detect, no web which he did not disentangle,

and the unfortunate wretch who commenced with all the confidence of preconcerted perjury never failed to retreat before him in all the confusion of exposure. Indeed, it was almost impossible for the guilty to offer a successful resistance. He argued, he cajoled, he ridiculed, he mimicked, he played off the various artillery of his talent upon the witness, he would affect earnestness upon trifles, and levity upon subjects of the most serious import, until at length he succeeded in creating a security that was fatal, or a sullenness that produced all the consequences of prevarication. No matter how unfair the topic he never failed to avail himself of it, acting upon the principle that in law, as well as in war, every stratagem was admissible. If he was hard pressed there was no peculiarity of person, no singularity of name, no eccentricity of profession at which he would not grasp, trying to confound the self-possession of the witness by the no matter how excited ridicule of the audience.”—Phillip’s *Curran* (cited by Ram).

Not only have the facts to be ascertained, conclusions from them must be made as the material for judgment. Generally speaking, matters of fact are ordinary and extraordinary. It is the skilful who give a stronger and more forcible credit to the opinion and judgment of those in authority. In forming conclusions, the jury will probably consider: (1) the uncontradicted statements of the witnesses and their credit; (2) weigh the contradictory testimony;

(3) sift the material from the immaterial facts and form the history.

Inferences of fact come not so much from direct as from circumstantial evidence, which creates at most a probability. Circumstances frequently result not from one but from several causes. This constitutes the weakness of Locke's method of agreement and disagreement which is adopted by Stephen, J., and renders it inferior to the induction of the Baconian philosophy.

Men differ in opinion on religion, politics, science, and art. As to these topics there is a latitude of circumstance and reasoning. The circumstances of a trial, and the reasoning to a verdict, are of a limited range, yet jurors differing in mental powers and acquirements, in age, profession, trade, habits, and manner of life, and being the same men in courts as out, sometimes disagree as to their verdict. Some individuals are "stiff in opinions, always in the wrong," to use the words of Dryden, some decide without inquiry, some inquire and decide not. One juror hears better than another, has a quicker apprehension of what a witness says, understands it more readily, has a better memory, is less subject to absence of mind; keeps his mind more attentive to what is going on, wandering neither from habit nor from any accidental noise or other chance incident. Moreover, after unanimity as to what is proved a mental abstraction or inference may be necessary; for example, whether there was a promise, an intention, or negligence. But

judges as well as juries are fallible, and sometimes give a "shocking," an "extraordinary decision," one which they "ought not to give," and which other judges should not follow. If the Court consists of an even number of judges, not seldom it is equally divided, and the public is surprised to find that the administration of human justice is a somewhat haphazard process. Again, it is not every learned judge, nor special juror that is acquainted with the unwritten law or usages of the fashionable, religious, play-going, racing, sporting, commercial, literary, and reading cliques, circles, and clubs. Be the jury special or common, it ought to be dispassionate, free from bias or prejudice, patient, deliberate, and careful. It is their province, whatever degree of subtlety they possess, to use their power to put impudence to shame, to protect innocency, to crush oppression and succour the afflicted, to advance justice and equity, and, in the words of holy writ, to help them to right that suffer wrong.

In arriving at a verdict, the jurors may put any questions to the witnesses which the Judge considers proper: section 166. Putting together the facts directly proved, and such inferences both for the affirmative and negative, they will balance one against the other and then return a reasonable verdict, yes or no, on each question submitted to them. The Judge then pronounces his judgment, which, however, must be based upon facts declared by the Act to be relevant and duly proved: section 165.

Judgments. There is a science of legal judgments which is concerned chiefly with the materials of which they are constructed and with the process of construction. In addition to customary or other existing law, the Legislature, it is to be remarked, makes law (*a*) prospectively, (*b*) prospectively and adoptively, (*c*) sometimes retrospectively: The judges make rules of law *ex post facto*, that is, their application of a recognised rule to a new state of facts, may create a legal precedent binding on inferior courts.—Ram.

The materials then are legislative statutes, and several other fountains or places, such as maxims, principles, rules. Littleton wrote of these, calling them proofs or arguments. Coke, in his Commentary on Littleton, emphatically tells us that we are to look to the intendment and reason of the law; to books, records, and other authorities; to the forms of good pleading; to approved precedents and use; to the common opinion of the sages of the law.

Much weight is also due to arguments *ab inconvenienti*, *a majore ad minus*, *a minore ad majus*, *a simili*, *a pari*, *ab utile*, *ab inutile*, *ex absurdo*: see Broom's *Maxims*. A case for adjudication consists of facts, law, and authorities, which have to be gathered. The entirety of facts may be new or fall within a rule. They may be concluded by precedent or be distinguishable therefrom, and fit to be adjudged upon on their own particular circumstances.

In most instances the judge should look forward to the consequences of the judgment contemplated.

A chief object is certainly in the law. But the verdict of a jury or the finding of a judge on a point of fact, his interpretation of a deed or will, must always be uncertain. This uncertainty belongs to the administration of justice that the minds of different men will differ upon the result of evidence which may lead to different decisions upon the same case. It frequently happens that different persons come to different conclusions from the same premises, for all reasoning is not syllogistically expressed.

Facts, as a material of judgment, necessitate an inquiry into their truth. For the rules governing such an inquiry in respect of the relevancy of the fact, the admissibility of written proof, the examination and cross-examination of a witness, the Indian Evidence Act ought to be consulted. Seeing, however, that the framers of the present code contemplate a more extended use of written authorities, we have inserted in a Schedule, several forms, some of which had the high *imprimatur* of Chief Justice Petheram, when practising as a barrister in England.

A fact in a story or group of facts, may also be a fact in another story or group. For example, the striking of the Houses of Parliament clock may fix the time of day or night, in which some honest or wicked deed was done. Some facts without being directly relevant form the ground of questions the adjudication of which is within the province of the jury.

An inquiry into the truth of a fact frequently in-

volves a consideration of the faculties of seeing and hearing, of feeling corporeally or mentally of the mental operations which produce effects such as intention, skill, knowledge, &c. Facts must also be considered as affirming or denying the truth or falsehood of a proposition whose logical correctness both sides may admit.

The perception of an object by sight depends upon situation, on its nearness or distance, upon the capacity of long or short sight, on the use of an instrument as a telescope. Light, darkness, and twilight are important factors. So are length of time, of view, obstructions, the shining in the face of the sun, the reflection from snow, and many other circumstances. And, above all, the eye may see many objects at once and yet the mind perceive but one. So with the ear; circumstances affect the sound, and one noise may confuse or drown another sound.

Witnesses may be unwilling to speak the truth, they may be prejudiced, partisan, or false. They may speak the truth, but not the whole. They may add something to what is otherwise true. They may be mistaken themselves, or misapprehended by others. Their knowledge may be imperfect, their narrative inconsistent with a former one. They may be men of integrity and candour, or their characters may be bad and even infamous. A witness's narrative of facts is understood to extend only to things at the time of relation in the memory. It is a just object to make the auditor mentally see and hear these things as the relater saw

and heard them, or as he did and said them. From carelessness or oversight he may omit many things, or fancy facts withheld to be immaterial. He may even avoid loading his story with details because he incorrectly thinks them unessential.

An open question imposes on even an honest witness the necessity of thought. And in cross-examination leading questions are admitted.

The faculty of memory requires consideration. Philosophically tested, that memory is best which acquires knowledge most quickly and accurately, retains it most tenaciously, and reproduces it most readily. The deeper an impression the longer it remains, and things new and extraordinary make the deeper impression. Recollection depends to some extent on the exercise of will. A written memorandum is the transcript of an impression. But dwelling on an inference may transmute it into a recollection. A casual circumstance may awaken a recollection. And an accident, like the fracture of a skull, produce aberrations of memory akin to insanity; see Abercrombie on the *Intellectual Powers*. Shakespere's *Tempest*, act i. scene 2, furnishes a pleasant view of childhood memory. While the old man eloquent, like Lord Chancellor Eldon, may too late in life commit to writing a series of anecdotes whose apparent historical value is diminished by the fact that at the time of narrative the boundaries between the narrator's memory and imagination had been broken down. Experience will enable the critic to

recognise in respect of persons and things the circumstances usually found in a story which is true: Cicero *De Rhetorica*, bk. i., ch. xxi.; *Orat. Part.*, ch. x.

Pope's aphorism that—

“The proper study of mankind is man,”

is peculiarly true in the case of examiners of witnesses. We have spoken of human faculties, but he should not forget the motives of conduct. Such motives are usually made apparent by some external act. For instance, revenge is evidenced by threats; see Cicero's *Oration for Milo*. The mental philosopher will not neglect mere physical impressions. “If the organs or faculties of perception are over-hardened with cold, like wax, they will not receive the impression of the seal from the usual impulse wont to impress it; or, like wax of a temper too soft, will not hold it when well imprinted; or else supposing the wax of a temper fit, but the seal not applied with sufficient force to make a clear impression: in any of these cases the print left by the seal will be obscure.”* Modern science tell us that the pictures photographed in the eye have various degress of permanency.

118. All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. Who may testify.

Explanation.—A lunatic is not incompetent to testify, un-

* Locke on the Understanding.

less he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

A child is an admissible witness though not capable of understanding the nature of an oath or solemn affirmation: *Q. v. M. Itwarya* (14 B. L. R. 54). But section 6 of the Oaths Act, 1873, X., requires that a witness shall swear or affirm, and the evidence of a child is inadmissible if it has been advisedly recorded without oath or affirmation: *Q. E. v. Maru* (I. L. R. 10 A. S. 207). This case contains a valuable history of the law as to oaths, and as to the testimony of children. The competency in respect of the intellectual capacity of any witness is a preliminary question to the taking of the witness's evidence: *Q. E. v. L. Sahai* (I. L. R. 11 A. S. 183).

Dumb
witnesses.

119. A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court. Evidence so given shall be deemed to be oral evidence.

Parties to
civil suits,
and their
wives or
husbands.

Husband or
wife of person
under criminal
charge a
competent
witness.

120. In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses. In criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness.

In a trial for conspiracy to debauch a woman, she is admissible as evidence for the defence: 9 S. T. 173.

It was resolved by all the judges in *Lord Castlehaven's Case*, that a wife may be witness against her husband to prove his aiding and abetting the commission of a rape upon herself: 3 S. T. 402.

In a prosecution on the statute of Henry VII. for forcibly marrying a woman of substance, the wife may give evidence of the facts against her husband, even though she afterwards acquiesced in the marriage: *Swendsen's Case* (14 S. T. 575).

It was the opinion of the Court of Exchequer in Ireland in the case of *Annesley v. Lord Anglesey*, that a wife may give evidence as to her husband's credibility upon his oath, but not on points affecting his property: 17 S. T. 1276. By the law of Scotland a wife could not in any case be a witness for or against her husband: 18 S. T. 580, note.

An alleged accomplice was acquitted, but re-arrested pending an appeal. Stuart, C.J., and Spankie, J., were divided in opinion as to the lawfulness of such re-arrest, and the consequent inadmissibility of his evidence pending the appeal against his fellow: *E. v. K. Bakhsh* (I. L. R. 2 A. S. 386).

121. No Judge or Magistrate shall, except upon the Judges and special order of some Court to which he is subordinate, be ^{Magistrates.} compelled to answer any questions as to his own conduct in Court as such Judge or Magistrate, or as to anything which came to his knowledge in Court as such Judge or Magistrate; but he may be examined as to other matters which occurred in his presence whilst he was so acting.

Illustrations.

(a.) A., on his trial before the Court of Session, says that a deposition was improperly taken by B., the Magistrate. B. cannot be compelled to answer questions as to this, except upon the special order of a superior Court.

(b.) A. is accused before the Court of Session of having given false evidence before B., a Magistrate. B. cannot be asked what A. said, except upon the special order of the superior Court.

(c.) A. is accused before the Court of Session of attempting to murder a police officer whilst on his trial before B., a Sessions Judge. B. may be examined as to what occurred.

An arbitrator is a kind of judge. But he may be asked questions for the purpose of showing that he has exceeded his powers, as, for instance, by awarding compensation for injuries not included in the matters submitted to him: *D. of Buccleugh v. Met. Board of Works* (L. R. 5 H. L. 418).

On the trial of Colonel Flacher, one of the regicides, it was resolved that two of the judges named in the commission were good witnesses for the prosecution: 5 S. T. 1181. A judge may give evidence as a witness in a cause tried before himself, but he ought first to be regularly sworn: 7 S. T. 874; 11 S. T. 459.

A juror was sworn to give evidence in a cause before a judge and his fellow jurors: 6 S. T. 1612, note; 18 S. T. 123. Mr. Barrington observes that in ancient times the witnesses to a deed were a necessary part of the jury who were to try its validity: 6 S. T. 113, note.

Counsel and attorneys are in England the only persons privileged from giving evidence of facts communicated to them in professional confidence; a medical man has no such privilege: 20 S. T. 573, 575, note.

The privilege is that of the magistrate or judge, of whom the question is asked. If he waives or does

not assert it, no other person can insist on it : *E. v. C. Khan* (I. L. R. 3 A. S. 573). In order to prove handwriting defendant may be interrogated as to his having written another letter than the libel to another person : *Jones v. Richards* (15 Q. B. D. 439). The substance of the libel was that plaintiff had fabricated a story to the effect that a certain circular letter purporting to be signed by the defendant had been sent round to his competitors in business. A judge out of court may be guilty of libel : *Johnson's Case* (29 St. T. 437).

122. No person who is or has been married, shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married ; nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative in interest, consents, except in suits between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other.

Communications during marriage.

123. No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.

Evidence as to affairs of State.

124. No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure.

Official communications.

125. No Magistrate or Police officer shall be compelled to say whence he got any information as to the commission of any offence.

Information as to commission of offences.

See Act III. of 1887, s. 1.

Professional
communications.

126. No barrister, attorney, pleader or vakil, shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney, or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment :

Provided that nothing in this section shall protect from disclosure—

(1) Any such communication made in furtherance of any *illegal purpose ;

(2) Any fact observed by any barrister, pleader, attorney or vakil, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.

It is immaterial whether the attention of such barrister, *pleader, attorney or vakil was or was not directed to such fact by or on behalf of his client.

Explanation.—The obligation stated in this section continues after the employment has ceased.

Illustrations.

(a.) A., a client, says to B., an attorney—"I have committed forgery, and I wish you to defend me."

As the defence of a man known to be guilty is not a criminal purpose, this communication is protected from disclosure.

(b.) A., a client, says to B., an attorney—"I wish to obtain possession of property by the use of a forged deed on which I request you to sue."

This communication, being made in furtherance of a criminal purpose, is not protected from disclosure.

(c.) A., being charged with embezzlement, retains B., an attorney,

* See Act No. XVIII. of 1872, s. 10.

to defend him. In the course of the proceedings B. observes that an entry has been made in A.'s account-book, charging A. with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment.

This being a fact observed by B. in the course of his employment showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure.

Only such communications are privileged as are of a confidential or private nature. Where defendants at an interview, at which the plaintiff was present, admitted their partnership to their attorney, who was then also acting for the plaintiff, the attorney was not precluded from giving evidence of the admission. It was not private; it was addressed to the attorney while acting for both parties: *M. H. Mahomed v. M. A. Karim* (I. L. R. 3 B. S. 91).

After the second word "barrister" insert "pleader," and for the word "criminal" substitute "illegal": Act XVIII. of 1872, s. 10. See *Q. v. Cox and Railton* (12 Q. B. D. 522).

Formerly in England the practice was to compel the client to disclose professional communications which were not made in anticipation of litigation. The present practice assimilates the discovery which can be required from the client to that which can be required from his professional adviser whether made in anticipation or not: *Lawrence v. Campbell* (4 Dr. 485); *Minet v. Morgan* (8 Ch. Ap. 361).

A plaintiff, at the instance of his solicitors, sent a gentleman to India for the express purpose of acting as the solicitor's agent in the collection of evidence

respecting a pending suit. Letters written by the agent either to the plaintiff or solicitor were protected: *Steele v. Stewart* (1 Phill. 471). The privilege which exempts a communication from production is the privilege of the client and not of the legal adviser, and communications relating to the subject-matter of a suit, and furnished with a view to litigation, are as much protected on principle when made by a lay agent to a litigant as when made to the legal adviser: *Ross v. Gibbs* (L. R. 8 Eq. 522; 2 Ch. D. 644). Accordingly the reports of the medical officer of a railway sent to examine a person injured thereon, were held privileged: *Cossey v. L. B. and S. C. Railway* (L. R. 5 C. P. 146; 1 C. P. D. 471). And papers which would have been privileged in a former action are thereby privileged in a subsequent action connected with the same affairs: *Bullock & Co. v. Corry & Co.* (3 Q. B. D. 356). The correspondence between two co-defendants after the institution of a suit is not, as a general rule, privileged. But where one defendant being a solicitor acted as agent for the solicitor on the record in collecting evidence in the suit, the correspondence which passed between him and his co-defendant was privileged: *Hamilton v. Nott* (L. R. 16 Eq. Ca. 112). Belief, founded on privileged communications, is equally privileged: *Lyell v. Kennedy* (9 App. Cas. 81). A legal adviser by attesting the execution of a document makes himself a public man, and may be compelled to disclose all that passed at the execution

even though it prove the invalidity of the document : *Crawcour v. Salter* (18 Ch. D. 30).

Semble, the word “illegal” would not include the sin of adultery : *Branford v. Branford* (L. R. 4 P. D. 72). A solicitor was compelled to disclose the address of his client, a ward of Court, who was endeavouring to conceal his residence : *Ramsbotham v. Senior* (L. R. 8 Eq. 575); *E. P. Campbell* (L. R. 5 Ch. Ap. 703). But the Court refused to order a solicitor to disclose the address of his client, a defendant, but not a ward, though he had absconded : *Heath v. Crealock* (L. R. 16 Eq. 257).

127. The provisions of section one hundred and twenty-six shall apply to interpreters and the clerks or servants of barristers, pleaders, attorneys and vakils.

Section 126 to apply to interpreters, &c.

128. If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section one hundred and twenty-six ; and if any party to a suit or proceeding calls any such barrister, *pleader, attorney or vakil as a witness, he shall be deemed to have consented to such disclosure only if he questions such barrister, attorney or vakil on matters which, but for such question, he would not be at liberty to disclose.

Privilege not waived to volunteering evidence.

After the word “barrister” insert “pleader” : Act XVIII. of 1872, s. 10.

129. No one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser, unless he

Confidential communications with legal advisers

* See Act No. XVIII. of 1872, s. 10.

offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others.

Production of
title-deeds of
witnesses not
a party.

130. No witness who is not a party to a suit shall be compelled to produce his title-deeds to any property, or any document in virtue of which he holds any property as pledgee or mortgagee, or any document the production of which might tend to criminate him, unless he has agreed in writing to produce them with the person seeking the production of such deeds or some person through whom he claims.

The mere fact of the possession of title-deeds without any satisfactory proof of the mode by which possession of them was acquired, was held by the Privy Council to be outweighed by the other adverse circumstances of the case: *K. Debia v. R. Chowdhry* (2 W. R. P. C. 1).

Title-deeds appertain to the person in possession of the freehold, but a remainderman or reversioner has a right to their production and inspection. Beneficiaries absolutely entitled to the possession of the estate have a right to the deed, or if they are infants their guardian has on their behalf. The bankruptcy trustee of the husband of a legal tenant for life, not entitled to her separate use, has no absolute right to the possession of the deeds, but where circumstances require it the Court will order them to be delivered up into its own custody: *E. P. Rogers* (26 Ch. D. 31). The beneficiaries have a right to inspect the deeds at reasonable times, and to copies of them at their own

expense, and also to copies of counsels' opinions taken at the expense of the trust: *Wynne v. Humbertson* (27 Beav. 421).

The general principle is that if a business be held on trust for successive tenants for life and remaindermen, and be carried on at a loss during the life of one tenant for life, the loss must be recouped out of the profits made during the life of the next tenant, and not out of the corpus: *Upton v. Brown* (26 Ch. D. 588).

131. No one shall be compelled to produce documents in his possession, which any other person would be entitled to refuse to produce if they were in his possession, unless such last-mentioned person consents to their production.

Production of documents which another person, having possession, could refuse to produce.

132. A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind.

Witness not excused from answering on ground that answer will criminate.

Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.

Proviso.

North, L.C.J., said in *Colledge's Case*, that the effect of evidence in a criminal trial is matter of law for the Court, and that the truth of the evidence is matter for the jury: 8 S. T. 710.

Judge Jenkins said that examinations in court not upon oath are merely communications, and not evidence : 4 S. T. 932.

Evidence of the general bad character was admitted for the prosecution on the trial of Major Faulconer for perjury during the Commonwealth : 5 S. T. 354.

Foster, J., made some remarks upon the reasonableness of the rule that in criminal trials, no evidence should be allowed which is foreign to the point in issue : 5 S. T. 978.

If a witness does not desire to have his answer used against him on a subsequent criminal charge, he must object to answer, although he may know beforehand that such objection, if the answer is relevant, is perfectly futile so far as his duty to answer is concerned, and must be overruled : *Q. v. G. Doss* (I. L. R. 3 M. S. 271) ; *Q. E. v. G. Sonba* (I. L. R. 12 B. S. 440).

Accomplice. **133.** An accomplice shall be a competent witness against an accused person ; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

In the recent case of *Q. E. v. Gobardhan*, Straight and Brodhurst, JJ., still differed as to corroboration of the statement of an accomplice being necessary for conviction of a prisoner : I. L. R. 9 A. S. 528.

Such uncorroborated evidence, though not illegal, that is, unlawful, is unsafe. The practice of the judges both in England and in India when sitting alone is to guard their minds carefully against acting on it, and

to warn the jury that acting on it is unsafe. There must be some corroboration independent of the accomplice or of a confessing prisoner to show that the party accused was actually engaged directly in the commission of the crime charged against him. A second accomplice does not improve the position of the first, and if there are two it is necessary that both should be corroborated. The accomplice must be corroborated not only as to one but as to all the persons affected by the evidence, and corroboration of his evidence as to one prisoner does not entitle his evidence as against another to be accepted without corroboration.

The possession of property taken from a murdered person is not adequate corroboration of the evidence of an accomplice charging such person in possession with participation in the murder, though it would be evidence that the prisoner participated in a robbery, or that he had dishonestly received stolen goods: *Q. E. v. R. Saran* (I. L. R. 8 A. S. 306); *Q. E. v Baldeo* (I. L. R. 8 A. S. 509); *Q. E. v. Krishnabat* (I. L. R. 10 B. S. 319).

The statement of a single credible witness is in law sufficient to support a conviction: *R. v. S. Manokar* (11 B. H. C. R. 126).

134. No particular number of witnesses shall in any case be required for the proof of any fact. Number of witnesses.

In England it is a rule of universal application not to allow a claim against the assets of a deceased

person upon the uncorroborated evidence of the plaintiff: *I. R. Harnett* (17 L. R. Ir. 143).

See page 245.

Where there is sufficient evidence of a fact it is no objection to the proof of it that more evidence might have been adduced; *A. Pellán v. S. Pellai* (9 M. I. A. 506). “*Volenti non fit injuria*” is a fundamental legal maxim: Wing, 482; and accordingly if a defendant consents to the judge deciding a case on insufficient evidence it may be decided thereon: *S. P. Mitter v. J. Mullick* (12 W. R. 244).

CHAPTER X.

OF THE EXAMINATION OF WITNESSES.

135. The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and, in the absence of any such law, by the discretion of the Court. Order of production and examination of witnesses.

It is a matter of favour and discretion in the Court to order witnesses to be examined apart: Treby, C.J., *P. Cook's Case* (13 S. T. 348); *Holt Vaughan's Case* (S. V. 494). As to the antiquity of the practice: 13 S. T. 348.

The *Civil Procedure Code*, Chap. X., ss. 121-145, contains numerous provisions relating to discovery by interrogatories to admission, inspection, production, impounding, and return of documents.

The Hindu test for the depositions of witnesses was not altogether an unreasonable one. "The King shall declare the matter in dispute clearly proved if the evidence be nothing wanting as to the place [or country], the time, age, thing in dispute itself, the name, caste [family or kind], its weight [or measure]." The rule for decision on the counter statements of witnesses was, "If the evidence be discordant the

testimony of the greater number shall prevail; if the witnesses be equal in number the testimony of the virtuous; if virtuous men depose too inconsistent facts the testimony of those who are most eminent by their honesty": Vyavahara Mayukha, Chap. II., s. 3, § 18. The rule does not make sufficient allowance for the intelligence, education, experience, and means of observation of the witnesses. It cuts the knots of difficult problems instead of industriously unravelling them.

Judge to
decide as to
admissibility
of evidence.

136. When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant, and not otherwise.

If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of such fact, and the Court is satisfied with such undertaking.

If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may, in his discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.

Illustrations.

(a.) It is proposed to prove a statement about a relevant fact by a person alleged to be dead, which statement is relevant under section thirty-two.

The fact that the person is dead must be proved by the person

proposing to prove the statement, before evidence is given of the statement.

(b.) It is proposed to prove, by a copy, the contents of a document said to be lost.

The fact that the original is lost must be proved by the person proposing to produce the copy, before the copy is produced.

(c.) A. is accused of receiving stolen property knowing it to have been stolen.

It is proposed to prove that he denied the possession of the property.

The relevancy of the denial depends on the identity of the property. * The Court may, in its discretion, either require the property to be identified before the denial of the possession is proved, or permit the denial of the possession to be proved before the property is identified.

(d.) It is proposed to prove a fact [A] which is said to have been the cause or effect of a fact in issue. There are several intermediate facts [B, C, and D] which must be shown to exist before the fact [A] can be regarded as the cause or effect of the fact in issue. The Court may either permit A to be proved before B, C, or D is proved, or may require proof of B, C, and D before permitting proof of A.

The statutory law contains numerous rules as to the admissibility of documents and proof thereby. Respecting the enrolment of volunteers: see Act XX. of 1869, s. 6; naturalisation of aliens: 33 Vict. c. 14, s. 12; 33 & 34 Vict. c. 102, s. 1; orders of Governor-General: 21 Geo. 3, c. 70, s. 6; instruments executed abroad: 26 Geo. 3, c. 57, s. 38; emigrants' instruments: Act III. of 1876, ss. 33, 90, and 54; documents of joint stock companies: Griffith's *Companies*, Act VI. of 1882; presidency banks: Act XI. of 1876, s. 18; scientific and literary societies: Act XXI. of 1860, s. 19; marriages: Act III. of 1872, s. 14; Act XV. of 1872, s. 80; petroleum: Act VIII. of 1881, s. 12; savings bank: Act V. of 1873, s. 8; embankment

award: Act XXXII. of 1855, s. 7 (9); power of attorney in High Court: Act VII. of 1882, s. 4 (d); declarations by printers and publishers: Act XXV. of 1867, ss. 7 and 8; copyright: Act XX. of 1847, s. 3; Act of Bankruptcy: 11 & 12 Vict. c. 21, s. 77.

Acceptor of bill of exchange may deny identity but not authority of drawer: s. 117 of I. E. A. Deposition from English Court is not evidence in a capital case: 13 Geo. 3, c. 63, ss. 44, 45.

It is a function of a judge not only to decide on the admissibility of evidence, but also on the evidence and facts on which the legal admissibility depends. And so upon the existence and sufficiency of a threat or promise to exclude confession. The belief of pending death to let in a dying declaration. The relationship of a declarant in matters of pedigree. The collusive absence of attesting witness to let in evidence of his signature. The sufficiency of a search for witness or an instrument that is a document to let in secondary evidence. The question whether an instrument be duly executed and come from the proper custody. The objection to a witness on the ground of imbecility. The competent knowledge of an expert to prove foreign laws. The questions of due notice to produce a document. The question of due service of a writ or summons. The validity of an excuse by a witness for not producing a document. The question of what Acts or declarations form part of *res gestæ*. The unity of character requisite to let in evidence of collateral facts. Such facts as those enumerated must

in the first instance be exclusively decided by the judge, however numerous and complicated the facts on which they depend.

It is also the function of the judge to explain to the jury the rules of law by which facts are to be proved and evidence weighed, and so to explain the nature of any presumption: to point out what is conclusive evidence by virtue of an Act of the Legislature: to point out when single witness insufficient to prove guilt: to caution jury when an accomplice is witness: to state opinion respecting merits of case.

137. The examination of a witness by the party who calls him shall be called his examination-in-chief.

Examination-in-chief.

The examination of a witness by the adverse party shall be called his cross-examination.

Cross-examination.

The examination of a witness, subsequent to the cross-examination, by the party who called him shall be called his re-examination.

Re-examination.

“The essence of cross-examination is that it is the interrogation by the advocate of one party of a witness called by his adversary, with the object either to obtain from such witness admissions favourable to his cause, or to discredit him. Cross-examination is the most effective of all means for extracting truth and exposing falsehood.”

“The test for determining whether the depositions of witnesses who are absent or who have been examined in a former suit can be received is whether the party against whom they are to be used had the power to cross-examine. If he could not have cross-examined,

the depositions of the witness ought not to be admitted against him." Norman and Seton Karr, JJ.: *Meer v. Lalla* (6 Sutherland, C. W. R. 181).

The same learned judges remarked that the faculty of interrogating witnesses effectively is one which requires a careful study and a considerable knowledge of human nature: S. C. In order to assist our readers we will follow the example of the two judges in referring to a celebrated passage of Quintilian upon cross-examination, and giving a translation thereof from the original Latin. He says: "In dealing with a witness who is to be compelled to speak the truth against his will, the greatest success consists in drawing out what he wishes to keep back. This can only be done by repeating the interrogation in greater detail. He will give answers which he thinks do not hurt his cause; and afterwards from many things which he will have confessed he will be led into such a strait that what he will not say he cannot deny. For, as in an oration, we generally collect scattered proofs which singly do not appear to press upon the accused, yet by being put together prove the charge. So a witness of this sort should be asked many things as to what went before—what came after—as to place, time, and circumstances and other things, so that he may fall upon some answer as to what he must necessarily either confess what is desired or contradict his former statements. If this does not happen it may become apparent that he will not speak or he may be drawn out and detected in some falsehood foreign to the

cause, or by being led on to say more than the matter requires in favour of the accused, the judge will be led to suspect him, which will damage his cause not less than if he had spoken the truth against the accused. It sometimes happens that the testimony given by a witness is inconsistent with itself. Sometimes (and that is the more frequent case), one witness contradicts another. A skilful interrogation may produce by art that which usually happens accidentally. Apart from the cause, witnesses are usually asked many questions which may be useful as to the lives of other witnesses, as to their own character and position, any crimes they have committed, their friendship or enmity to the parties—in the answers to which they may either make some useful admission or be detected either in a falsehood or a desire of injuring the opposite party.” The same able teacher of rhetoric also tells us, the first thing is to know your witness. For a timid man can be frightened, a fool deceived, an angry man excited, a vain man puffed up, a deep one drawn out; but a prudent and consistent witness is at once to be dismissed as hostile or obstinate, is to be refuted either by refusing to ask him a question or by a curt remark; or if possible to be cooled by a neat witticism; or his influence destroyed by evidence against him of infamous conduct: Quintilian, *Inst. Orat.*, lib. v., ch. 7, *De Testibus*. As to the worth of evidence: see Cicero, *Oratorical Partitions*, chs. xxxii., xxxv. The giving of any documentary evidence by an accused person during the cross-exami-

nation of witnesses for the prosecution and before he is asked under section 289 of the C. P. C. if he means to adduce evidence, does not give the prosecution a right to reply: *E. v. K. Doss* (I. L. R. 14 C. S. 245).

Order of
examinations,
direction of
re-examina-
tion.

138. Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

A defendant in the trial of a warrant case "shall at any time while he is making his defence be allowed to recall and cross-examine any witness for the prosecution present in the Court or its precincts": Griffith's *Crim. P. C.*, s. 256.

See *Q. E. v. N. Ram*, in note to section 167.

Cross-
examination
of person
called to
produce a
document.

139. A person summoned to produce a document does not become a witness by the mere fact that he produces it, and cannot be cross-examined unless and until he is called as a witness.

The person summoned need not attend personally in a civil case: Griffith's *Civ. P. C.*, s. 164.

Witnesses to
character.

140. Witnesses to character may be cross examined and re-examined.

141. Any question suggesting the answer which the person putting it wishes or expects to receive, is called a leading question.

Leading questions.

142. Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in a re-examination, except with the permission of the Court.

When they must not be asked.

The Court shall permit leading questions as to matters which are introductory or undisputed, or which have in its opinion, been already sufficiently proved.

In order to identify a prisoner on his trial he may be directly pointed out to the witness, who may then be asked whether that is the person: *Watson's Case* (32 S. T. 74). Leading questions for purpose of identification and to refresh an exhausted memory are permissible.

143. Leading questions may be asked in cross-examination.

When they may be asked.

144. Any witness may be asked, whilst under examination, whether any contract, grant, or other disposition of property, as to which he is giving evidence, was not contained in a document, and if he says that it was, or if he is about to make any statement as to the contents of any document, which, in the opinion of the Court, ought to be produced, the adverse party may object to such evidence being given until such document is produced, or until facts have been proved which entitle the party who called the witness to give secondary evidence of it.

Evidence as to matters in writing.

Explanation.—A witness may give oral evidence of statements made by other persons about the contents of documents if such statements are in themselves relevant facts.

Illustration.

The question is, whether A. assaulted B.

C. deposes that he heard A. say to D.—“B. wrote a letter accusing me of theft, and I will be revenged on him.” This statement is relevant, as showing A.’s motive for the assault, and evidence may be given of it, though no other evidence is given about the letter.

Cross-examination as to previous statements in writing.

145. A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

In criminal cases the Court ought to object to the introduction of inadmissible evidence: Griffith’s *Crim. P. C.*, s. 256.

“Contradict him by writing.” This applies to police diaries, see Act X. of 1882, s. 172.

In a suit for wrongful dismissal, in which the defendants pleaded justification by reason of the plaintiff’s misconduct, cross-examination of the plaintiff respecting such misconduct is permitted with a view of shaking his credit. A. was employed, at intervals of a week or fortnight, to write up B.’s account books, B. furnishing him with the necessary information either orally or from loose memoranda:—*Held*, that the entries so made could not be given in evidence against A. to contradict him as to statements previously made by him in writing. For the statements were really made by B., under whose instructions

A. wrote them : *Munchershaw v. The New Dhurumsey Spinning and Weaving Co.* (I. L. R. 4 B. S. 576).

Where any person, whether he has been party to the proceedings or not, has made an affidavit, which has been filed for the purpose of being used before the Court, he becomes liable to cross-examination, and cannot be exempted from such liability by the withdrawal of the affidavit : *Quarby Hill Co. v. E. P. Young* (21 Ch. D. 642, C. A.).

146. When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend—

Questions
lawful in
cross-
examination.

- (1) To test his veracity ;
- (2) To discover who he is and what is his position in life ; or
- (3) To shake his credit by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him, or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

Penal Code, s. 499.

147. If any such question relates to a matter relevant to the suit or proceeding, the provisions of section one hundred and thirty-two shall apply thereto.

When witness
to be com-
pelled to
answer.

148. If any such question relates to a matter not relevant to the suit or proceeding, except in so far as it affects the credit of the witness by injuring his character, the Court shall decide whether or not the witness shall be compelled to answer it, and may, if it thinks fit, warn the witness that he is not obliged to answer it. In exercising

Court to
decide when
question shall
be asked and
when witness
compelled to
answer.

its discretion, the Court shall have regard to the following considerations :—

(1.) Such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies :

(2.) Such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies :

(3.) Such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence :

(4.) The Court may, if it sees fit, draw from the witness's refusal to answer, the inference that the answer if given would be unfavourable.

Question not
to be asked
without
reasonable
grounds.

149. No such question as is referred to in section one hundred and forty-eight ought to be asked, unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well founded.

Illustrations.

(a.) A barrister is instructed by an attorney or vakil that an important witness is a dākāit. This is a reasonable ground for asking the witness whether he is a dākāit.

(b.) A pleader is informed by a person in Court that an important witness is a dākāit. The informant, on being questioned by the pleader, gives satisfactory reasons for his statement. This is a reasonable ground for asking the witness whether he is a dākāit.

(c.) A witness, of whom nothing whatever is known, is asked at random whether he is a dākāit. There are here no reasonable grounds for the question.

(d.) A witness, of whom nothing whatever is known, being questioned as to his mode of life and means of living, gives unsatisfactory answers. This may be a reasonable ground for asking him if he is a *dákáit*.

150. If the Court is of opinion that any such question was asked without reasonable grounds, it may, if it was asked by any barrister, pleader, *vakil* or attorney, report the circumstances of the case to the High Court or other authority to which such barrister, pleader, *vakil* or attorney is subject in the exercise of his profession.

Procedure of Court in case of question being asked without reasonable grounds.

151. The Court may forbid any questions or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the Court, unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.

Indecent and scandalous questions.

152. The Court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the Court needlessly offensive in form.

Questions intended to insult or annoy.

153. When a witness has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him; but if he answers falsely, he may afterwards be charged with giving false evidence.

Exclusion of evidence to contradict answers to questions testing veracity.

Exception 1.—If a witness is asked whether he has been previously convicted of any crime and denies it, evidence may be given of his previous conviction.

Exception 2.—If a witness is asked any question tending to impeach his impartiality, and answers it by denying the facts suggested, he may be contradicted.

Illustrations.

(a.) A claim against an underwriter is resisted on the ground of fraud.

The claimant is asked whether, in a former transaction, he had not made a fraudulent claim. He denies it.

Evidence is offered to show that he did make such a claim.

The evidence is inadmissible.

(b.) A witness is asked whether he was not dismissed from a situation for dishonesty. He denies it.

Evidence is offered to show that he was dismissed for dishonesty.

The evidence is not admissible.

(c.) A. affirms that on a certain day he saw B. at Lahore.

A. is asked whether he himself was not on that day in Calcutta. He denies it.

Evidence is offered to show that A. was on that day at Calcutta.

The evidence is admissible, not as contradicting A. on a fact which affects his credit, but as contradicting the alleged fact that B. was seen on the day in question in Lahore.

In each of these cases the witness might, if his denial was false, be charged with giving false evidence.

(d.) A. is asked whether his family has not had a blood-feud with the family of B. against whom he gives evidence.

He denies it. He may be contradicted on the ground that the question tends to impeach his impartiality.

Question by
party to his
own witness.

154. The Court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.

Impeaching
credit of
witness.

155. The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him :—

(1.) By the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit ;

(2.) By proof that the witness has been bribed, or has *accepted the offer of a bribe, or has received any other corrupt inducement to give his evidence ;

(3.) By proof of former statements inconsistent with any part of his evidence which is liable to be contradicted.

* See Act No. XVIII of 1872, section 11.

(4.) When a man is prosecuted for rape, or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.

Explanation.—A witness declaring another witness to be unworthy of credit may not, upon his examination-in-chief, give reasons for his belief, but he may be asked his reasons in cross-examination, and the answers which he gives cannot be contradicted, though, if they are false, he may afterwards be charged with giving false evidence.

Illustrations.

(a.) A. sues B. for the price of goods sold and delivered to B.

C. says that he delivered the goods to B.

Evidence is offered to show that, on a previous occasion, he said that he had not delivered the goods to B.

The evidence is admissible.

(b.) A. is indicted for the murder of B.

C. says that B., when dying, declared that A. had given B. the wound of which he died.

Evidence is offered to show that, on a previous occasion, C. said that the wound was not given by A. or in his presence.

The evidence is admissible.

The proper question to be put to a witness who is called to impeach another witness is whether, from his knowledge of his general character, he thinks that he is deserving of belief upon his oath: *Delamotte's Case*, Buller, J. (21 S. T. 811).

A witness cannot be examined on the *voir dire** to any matter which only affects his credit, and is no objection to his competency.

If a witness on the *voir dire** denies a fact on which an objection to his competency is founded the matter is concluded: *Lord Lovat's Case* (10 S. T. 596). Lord

* *Voir dire*, that is, the preliminary examination as to competency. For the present rule of competency, see section 118.

Hardwicke thus states the rule : A party objecting to the competency of a witness may prove his objection by the oath of the witness or other testimony ; but if he examines the witness, and he denies the fact, he is concluded, and cannot call other testimony to sustain his objection : 10 S. T. 730.

Evidence of what a witness said on another occasion is admissible to show his consistency respecting the subject of his evidence in a particular case : 27 S. T. 432.

In the case of Sir Nicholas Throckmorton the evidence of a person convicted of treason was admitted for the prosecution though objected to by the prisoner : 1 Howell's S. T. 880. A person confessing treason, but not attainted, was held a sufficient witness to prove treason against others : *Duke of Norfolk's Case* (S. V. 1022). The evidence on oath of the testimony of an absent person on a former occasion was allowed against a prisoner on his trial for felony : *Udall's Case* (S. V. 1282). An examination not signed by the party examined, but attested by others, allowed to be evidence against a prisoner on his trial for treason : *Sir Walter Raleigh's Case* (2 S. T. 15). It was resolved by all the judges in *Lord Castlehaven's Case* that a wife may be a witness against her husband to prove his aiding and abetting the commission of a rape upon herself : 3 S. T. 402.

Jeffries, C.J., refused to hear a witness who was called to prove that he had perjured himself on a former occasion : 10 S. T. 1185, Qy. 9.

On the trial of Elizabeth Canning for perjury, Legge, B., refused to admit such evidence: 19 S. T. 632. In former times evidence of acts of particular misconduct was admitted for the purpose of discrediting witnesses: 7 S. T. 1459, 1478. Instances in modern times of evidence in support of character of a witness being admitted for the purpose of establishing his credibility: *Murphy's Case* (19 S. T. 724). The maxim of the civil law is *In testem testes et in hos sed non datur ultra*.

In paragraph (2) for the word "had" substitute "accepted": Act XVIII. of 1872, s. 11.

The principle that parties cannot, without the leave of the Court, cross-examine witnesses whom they have already examined, or, having declined to examine, the Court has examined, equally applies, whether it is intended to direct the cross-examination to facts in the issue or to circumstances affecting the credibility of the witness, for every question affecting credibility is designed to get rid of his other answers just as much as one that may bring out an inconsistency or contradiction.

The statement of a witness for the defence that a witness for the prosecution was at a particular place at a particular time, and consequently could not have been at another place where he swore that he was, and saw the accused, is admissible in evidence, even though the witness for the prosecution was not cross-examined on the point: *R. v. S. Mukundji* (11 B. H. C. R. 166). Discrepancies are not less infirmative of

testimony, because a greater sagacity on the part of the witnesses would have avoided them : *R. v. K. Patil* (S. V. 146) ; see *R. v. U. Kapurchand* cited in note to 159.

A person whose statement is reduced to writing by a police constable under Griffiths' Criminal Procedure Code, ss. 161-162, may be questioned about it, and with a view to impeach his credit, the police officer, or any other person in whose presence the statement was made, can be examined on the point : *Q. E. v. S. Vithal* (I. L. R. 11 B. S. 657). See p. 291.

Where in an interpleader proceeding the claimant deposits the amount of the value of the goods claimed as fixed by appraisement, he cannot, if the amount so deposited be less than £20, claim to appeal on the ground that the value of the goods was over £20, and that a less amount was deposited because it was sufficient to satisfy the execution creditor's judgment : *Cave and Smith, JJ.* (58 L. T. Rep. N. S. 225).

Questions
tending to
corroborate
evidence of
relevant fact,
admissible.

156. When a witness whom it is intended to corroborate, gives evidence of any relevant fact, he may be questioned as to any other circumstances which he observed at or near to the time or place at which such relevant fact occurred, if the Court is of opinion that such circumstances, if proved, would corroborate the testimony of the witness as to the relevant fact which he testifies.

Illustration.

A., an accomplice, gives an account of a robbery in which he took part. He describes various incidents unconnected with the robbery which occurred on his way to and from the place where it was committed.

Independent evidence of these facts may be given in order to corroborate his evidence as to the robbery itself.

157. In order to corroborate the testimony of a witness, Former statements of witness may be proved to corroborate later testimony as to same fact.
any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

The “statement” may be written or oral, on oath or in conversation. Account books duly kept in ordinary course of business are admissible.

This section recognises the mere repetition of the same statement of facts without contradiction or material discrepancy as some corroboration of its truth. But what is easier for a man than to repeat his own narrative of events with accuracy, and when coming to describe the acts of a particular person to change his personality so as to exculpate a guilty friend and to implicate an innocent person or enemy? This observation specially applies to an approver: *Q. E. v. B. Biswas* (I. L. R. 10 C. S. 970).

158. Whenever any statement, relevant under sections thirty-two or thirty-three, is proved, all matters may be proved, either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested. What matters may be proved in connection with proved statement relevant under sections 32 or 33.

159. A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is Refreshing memory.

questioned, or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory.

The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct.

When witness may use copy of document to refresh memory.

Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the Court, refer to a copy of such document: Provided the Court be satisfied that there is sufficient reason for the non-production of the original.

An expert may refresh his memory by reference to professional treatises.

On the trial of Colonel Adrian Scroop, one of the regicides, one of the witnesses was permitted to refresh his memory by reading a written paper: 5 S. T. 1039. Where a witness refreshes his memory by written memoranda, it is the usual and reasonable practice that the other side should inspect them for the purpose of cross-examining him: Eyre, C.J., *Hardy* (24 S. T. 824). But a witness can only make use of memoranda made immediately at the time of the transaction to which he speaks: 25 S. T. (Scotch), 936, and see *Horne Tooke's Case* (*ib.*).

Oral statements made to a police officer during the investigation, do not become part of the record merely because they are reduced to writing. But it may be used for the purpose of refreshing memory. The person who made the statements may be questioned about them with a view to impeach his

credibility, and the police officer, or other person who heard them, can be examined for that purpose: *R. v. U. Kapurchand* (11 B. H. C. R. 120).

See *Q. E. v. S. Vithal* in note to section 155.

A register kept by the plaintiff's gomastas of the names of the executants of bonds, the matter in respect of which they were given, and the amounts due thereon, and the names of the attesting witnesses, though not secondary evidence of the contents of the bonds, may be referred to for the purpose of refreshing memory: *T. N. Mullick v. J. Nosya* (I. L. R. 5 C. S. 353).

The grounds upon which an opposite party is permitted to inspect a writing and to refresh the memory of a witness are threefold: (1) to secure the full benefit of a witness's recollection as to the whole of the facts; (2) to check the use of improper documents; (3) to compare his oral testimony with his written statement. The opposite party has the right to look at any document at the moment when the witness uses it to refresh his memory in order to answer a particular question. If he then neglects to exercise his right he cannot continue to retain the right throughout the whole of the subsequent examination of the witness: I. M. P. of *J. Mahton* (I. L. R. 8 C. S. 739).

An actuary may refer to mathematical tables: L. R. 8 Ex. 221; an architect to price lists of acknowledged accuracy; a physician to medical treatises of authority.

Testimony to facts stated in documents mentioned in section 159. **160.** A witness may also testify to facts mentioned in any such document as is mentioned in section one hundred and fifty-nine, although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document.

Illustration.

A book-keeper may testify to facts recorded by him in books regularly kept in the course of business, if he knows that the books were correctly kept, although he has forgotten the particular transactions entered.

Right of adverse party as to writing used to refresh memory. **161.** Any writing referred to under the provisions of the two last preceding sections must be produced and shown to the adverse party if he requires it; such party may, if he pleases, cross-examine the witness thereupon.

Production of documents. **162.** A witness summoned to produce a document shall, if it is in his possession or power, bring it to Court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the Court.

The Court, if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility.

Translation of documents. If for such a purpose it is necessary to cause any document to be translated, the Court may, if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence; and if the interpreter disobeys such direction, he shall be held to have committed an offence under section one hundred and sixty-six of the Indian Penal Code.

In *Francia's Case* for treason, where one of the overt acts charged was the writing of certain letters, the contents of which were not set out in the indictment, an

objection by the prisoner to their admission was overruled: 15 S. T. 931.

“Whoever being legally bound to produce or deliver up any document to any public servant as such, intentionally omits so to produce or deliver up the same shall be punished with simple imprisonment for a term of imprisonment which may extend to one month, or with fine, which may extend to Rs.500, or with both; or if the document is to be produced or delivered up to a Court of Justice, with simple imprisonment, which may extend to six months, or with fine, which may extend to Rs.1000, or with both”: I. P. C., s. 175.

163. When a party calls for a document which he has given the other party notice to produce, and such document is produced and inspected by the party calling for its production, he is bound to give it as evidence if the party producing it requires him to do so. Giving, as evidence, of document called for and produced on notice.

164. When a party refuses to produce a document which he has had notice to produce, he cannot afterwards use the document as evidence without the consent of the other party or the order of the Court. Using, as evidence, of document production of which was refused on notice.

Illustration.

A. sues B. on an agreement, and gives B. notice to produce it. At the trial, A. calls for the document and B. refuses to produce it. A. gives secondary evidence of its contents. B. seeks to produce the document itself to contradict the secondary evidence given by A., or in order to show that the agreement is not stamped. He cannot do so.

For other consequences, see Act XIV. of 1882, ss. 131 and 136, Griffith's Edition, pp. 57-59.

Judge's
power to put
questions or
order produc-
tion.

165. The judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing: and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question:

Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved:

Provided also, that this section shall not authorize any judge to compel any witness to answer any question, or to produce any document which such witness would be entitled to refuse to answer or produce under sections one hundred and twenty-one to one hundred and thirty-one, both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the judge ask any question which it would be improper for any other person to ask under sections one hundred and forty-eight or one hundred and forty-nine; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted.

As a witness summoned by the prosecution, but not called, ought to be placed in the box that the accused may cross-examine him, so *à fortiori* the prisoner ought to be allowed to cross-examine a witness questioned by the judge: *I. M. E. v. G. C. Talukdar* (I. L. R. 5 C. S. 614). It is not the province of the Court to examine the witnesses, unless the pleaders on either side have omitted to put some material question or questions: *Noor v. E.* (I. L. R. 6 C. S. 283).

“Document or thing” even if in the custody of a stranger to a civil proceeding: Griffith’s Civ. P. C., s. 171.

Should the judge ask any questions with a view to the taking of criminal proceedings against the witness they need not be answered, and refusal does not entail punishment under I. P. C., s. 179; *Q. E. v. H. Lakshman* (I. L. R. 10 B. S. 185).

166. In cases tried by jury, or with assessors, the jury or assessors may put any questions to the witnesses, through or by leave of the judge, which the judge himself might put, and which he considers proper.

Power of jury
or assessors to
put questions.

Induction (see pp. 250–251) is the making an illation or inference from physical facts. It is also used to denote the result as well as the process. It bears the same relation to physical researches that deduction does to those which are metaphysical, including in metaphysical the science of logic. It is both the act of drawing a conclusion and also the conclusion itself out of and in addition to single facts, as a general fact or presumed truth in which they all meet, yet a truth which the facts do not necessarily contain or constitute, and which may therefore suggest itself with greater or less degree of force and be strengthened or weakened by subsequent experience. Thus Newton from observing that ripe fruit falls from the tree to the ground, and from other single facts, inferred the law of gravitation, and then the true solar system of the planets circling round the sun. His theories are annually

confirmed by the almanacks published by the Astronomer-Royal to assist the navigators of ships. Such almanacks contain the different positions which the planets and stars will occupy at fixed dates, the positions being derived from calculations based on the law of gravitation and made some years in advance.

Deduction, on the other hand, is the mental recognition of some particular as included or contained in something more general, or the recognition of something general as necessarily constituted by certain particulars. Thus, having once admitted that all things tend to the centre, the tendency of any one particular thing to the centre necessarily follows the moment the mind understands the proposition. Physical truths once admitted stand on the footing of notions purely mental as to the consequences that follow, which consequences therefore, like all metaphysical deductions, are the acts of the mind about its own notions. The process by which the law of gravitation is inferred is an induction. The law of gravitation being assumed, it is a deduction that a particular thing tends to the centre. From observations that spring and harvest occur in particular years at special seasons, the mind induces the fact that spring and harvest will occur in all years at the same periods. And from this general truth the mind deduces the dates of the period of any particular spring or harvest.

A metaphysical induction, or the illation of a general truth from admitted particular truths that

constitute it, is a different thing from the illation of physical science, and for scientific purposes must be distinguished.

The word induction, in popular use, is sometimes employed to signify the examination of particulars for the purpose of illation whether of a physical truth or a metaphysical aggregate, sometimes the act of illation, and sometimes the truth or aggregate inferred.

In scholastic logic induction ought consistently to be restricted to metaphysical induction, but it is not always so restricted. In rhetoric, the confirming of a general proposition by the statement of single facts is sometimes called an argument from enumeration; when each fact in the detailed statement requires only to be brought forward to be admitted. If the general proposition is previously admitted as the aggregate of single facts the argument is strictly deductive and the proof metaphysical or demonstrative. If the facts are admitted on the ground of probability alone, and the general proposition not as a metaphysical, but only as a moral universal, the argument is strictly inductive, and the proof can amount at its strongest only to what is called moral certainty. But facts may be admitted on experimental evidence only. Any general proposition suggesting itself as a truth in which they all meet depending on such evidence is a possible or contingent rather than an absolute truth. Inductive evidence depending on experiment and unconfirmed by experience may be fallacious or may possess different degrees of mental cogency.

The judge's charge to the jury enunciates the major premiss of a logical syllogism. "All persons who do certain acts transgress the law." The jury have to determine whether a particular person, the accused or defendant, did those acts. In reasoning on the truth of the alleged facts they perform processes of induction (1) as to the truth of the allegations; (2) as to the alleged facts constituting the defined acts. They then deduce the conclusion of the syllogism, which may be the guilt or innocence of the party.

Powers to deal with evidence taken by a prior judge, to examine immediately a witness about to leave the jurisdiction, and to recall and examine witnesses, are given by the Civil Procedure Code: see Griffiths' Commentaries, pp. 70-71.

CHAPTER XI.

OF IMPROPER ADMISSION AND REJECTION OF EVIDENCE.

167. The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

No new trial
for improper
admission or
rejection of
evidence.

The more convenient way of summing up for a judge to follow is to present to the jury as clearly and impartially as he can a summary of the evidence and the considerations and inferences to be drawn from the evidence as they bear both on the affirmative and the negative sides of each of the issues. Beyond this he should not seek to persuade the jury: 10 B. L. R. Ap. 36.

Semle, this section applies to criminal trials: *R. v. N. Dadabhai* (9 B. H. C. R. 358).

The direction of s. 346 C. Cr. P. 1861, was not satisfied by the words "signature of A. B. the accused; the handwriting of C. D." at the end of the confession. And the present section did not cure

the insufficiency: *R. v. D. Anand* (11 B. H. C. R. 44).

Although the transfer by a judge of a case from the file of the munsif to that of his own court, and the decision of it upon issues framed by, and evidence taken before the munsif is improper, yet if no objection be taken at the time it must be presumed that the parties consented thereto. They are not at liberty to wait the decision, and then if adverse to appeal: *Y. Ali v. L. Dass* (6 R. H. C. N. W. P. 80).

At the hearing of an appeal dismissing a suit by a wife for dissolution of marriage, on the ground of her husband's incestuous adultery with her sister M., and cruelty, the appellant produced certain letters written by the respondent and M. to each other, which showed that a criminal intimacy existed between them. These letters were not written until the appellant had filed the appeal:—*Held*, that such letters were admissible, and should be admitted, and that having been brought to the Court's notice by the appellant's counsel, the Court was bound, in the interests of justice, to require their production in order to enable it to decide the appeal on the real merits: *Morgan v. Morgan* (I. L. R. 4 A. S. 306).

At the trial of a party of Hindus for rioting, the magistrate, instead of examining the witnesses, read their examination-in-chief at a previous trial of a party of Mahomedans implicated in the same riot. After the reading out, the prisoners, without objection, cross-examined them:—*Held*, that the irregularity

was cured. See also C. P. C. 537; *Q. E. v. N. Ram* (I. L. R. 9 A. S. 609).

This section applies to criminal as well as to civil cases: *Q. v. H. C. Ghose* (I. L. R. 1 C. S. 207).

The Privy Council will not reverse a decree because evidence which did not affect the judgment was improperly admitted: 13 M. I. A. 83.

SCHEDULE.

ENACTMENTS REPEALED.

[See Section 2.]

Number and year.	Title.	Extent of repeal.
Stat. 26 Geo. 3, c. 57.	For the further regulation of the trial of persons accused of certain offences committed in the East Indies; for repealing so much of an Act, made in the twenty-fourth year of the reign of his present Majesty (intituled "An Act for the better regulation and management of the affairs of the East India Company, and of the British possessions in India, and for establishing a court of judicature for the more speedy and effectual trial of persons accused of offences committed in the East Indies"), as requires the servants of the East India Company to deliver inventories of their estates and effects; for rendering the laws more effectual against persons unlawfully resorting to the East Indies; and for the more easy proof, in certain cases, of deeds and writings executed in Great Britain or India.	Section thirty-eight so far as it relates to Courts of Justice in the East Indies.

Number and year.	Title.	Extent of Repeal.
Stat. 14 & 15 Vict. c. 99.	To amend the Law of Evidence.	Section eleven and so much of section nineteen as relates to British India.
Act XV. of 1852	To amend the Law of Evidence.	* So much as has not been heretofore repealed.
Act XIX. of 1853.	To amend the Law of Evidence in the Civil Courts of the East India Company in the Bengal Presidency.	Section nineteen.
Act II. of 1855	For the further improvement of the Law of Evidence.	So much as has not been heretofore repealed.
Act XXV. of 1861.	For simplifying the Procedure of the Courts of Criminal Judicature not established by Royal Charter.	Section two hundred and thirty-seven.
Act I. of 1868...	The General Clauses Act, 1868.	Sections seven and eight.

* See Act No. XVIII. of 1872, section 12.

ACT No. XVIII OF 1872.

An Act to amend the Indian Evidence Act.

The amendments contained in the sections of this Act have been noticed in the notes, and, therefore, the sections are not reprinted.

THE INDIAN OATHS ACT, 1873.

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ACT No. X. OF 1873.

Received the Governor General's assent on the 8th April, 1873.

An Act to consolidate the law relating to Judicial Oaths, and for other purposes.

Preamble. WHEREAS it is expedient to consolidate the law relating to judicial oaths, affirmations, and declarations, and to repeal the law relating to official oaths, affirmations, and declarations: It is hereby enacted as follows:—

I.—Preliminary.

Short title. 1. This Act may be called the Indian Oaths Act, 1873:

Local extent. It extends to the whole of British India, and so far as regards subjects of Her Majesty, to the territories of Native Princes and States in alliance with Her Majesty.

Oaths not only by the terrors of conscience and the penalties of the law deter from the giving of positively false testimony, they give courage to timid witnesses and others when called on to speak the truth. A witness giving evidence in the presence of a delinquent of high rank, or with whom he had been on terms of friendship, would, after the administration

to him of a solemn oath, think his patron or friend would have less cause to take amiss the truth declared.

According to Michaelis (Laws of Moses, Art. 292) no punishment was annexed to this "species of false witness, unless it amounted to charging another person with a crime, although it redounded not to the loss but to the advantage of the person accused; in other words, the denial or concealment of a crime well-known to the witness, incurred no punishment" from a human tribunal.

This Act has been declared in force in Upper Burma generally: see Act XX. of 1886, Sch. II., part I.

It is included in the Schedule to the Santal Parganas Laws, Regulation III. of 1886.

It has been declared under the Scheduled Districts Act, 1874, to be in force in the following Scheduled Districts, namely:—

The Districts of Hazaribagh, Lohárdaga, and Manbhum, and Pargana Dhalbhum and the Kolhan in the District of Singbhum: *Gazette of India*, 22nd October, 1881, part I., p. 504; Tarai, in the North-Western Provinces, *Gazette*, 23rd September, 1876, part I., p. 504. It has also been extended to the Scheduled District of Coorg, *Gazette*, 5th August, 1876, part I., p. 417.

Part of this first section was repealed by Act XII. of 1876, namely, the part relating to the commencement.

Saving of
certain oaths
and affirma-
tions.

2. [This section was repealed by Act XII. of 1873.]

3. Nothing herein contained applies to proceedings before courts-martial, or to oaths, affirmations, or declarations prescribed by any law which, under the provisions of the Indian Councils' Act, 1861, the Governor-General in Council has not power to repeal.

II.—Authority to administer Oaths and Affirmations.

Authority to
administer
oaths and
affirmations.

4. The following Courts and persons are authorised to administer, by themselves or by an officer empowered by them in this behalf, oaths and affirmations in discharge of the duties or in exercise of the powers imposed or conferred upon them respectively by law:—

(a.) All Courts and persons having by law or consent of parties authority to receive evidence;

(b.) The commanding officer of any military station occupied by troops in the service of Her Majesty: provided

(1) That the oath or affirmation be administered within the limits of the station, and

(2) That the oath or affirmation be such as a justice of the peace is competent to administer in British India.

III.—Persons by whom Oaths or Affirmations must be made.

Oaths or
affirmations
to be made
by—
witnesses :

5. Oaths or affirmations shall be made by the following persons:—

(a.) All witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any Court or person having by law or consent of parties authority to examine such persons or to receive evidence:

(b.) Interpreters of questions put to, and evidence interpreters :
given by witnesses; and

(c.) Jurors.

jurors.

Nothing herein contained shall render it lawful to administer, in a criminal proceeding, an oath or affirmation to the accused person, or necessary to administer to the official interpreter of any Court, after he has entered on the execution of the duties of his office, an oath or affirmation that he will faithfully discharge those duties.

6. Where the witness, interpreter, or juror is a Hindú or Muhammadan,

Or has an objection to making an oath,

He shall, instead of making an oath, make an affirmation.

Affirmation
by natives or
by persons
objecting to
oaths.

In every other case the witness, interpreter, or juror shall make an oath.

Amongst the Jews, witnesses before they gave their evidence were obliged to take an oath, or, more properly speaking, to hear an oath read over, which was in the form of an adjuration: *Lev. v., 1*; *Matt. xxvi., 62*.

IV.—Forms of Oaths and Affirmations.

7. All oaths and affirmations made under section five shall be administered according to such forms as the High Court may from time to time prescribe.

Forms of
oaths and
affirmations.

And until any such forms are prescribed by the High Court, such oaths and affirmations shall be administered according to the forms now in use.

Explanation.—As regards oaths and affirmations administered in the Court of the Recorder of Rangoon and the Court of Small Causes of Rangoon, the Recorder of

Rangoon shall be deemed to be the High Court within the meaning of this section.

Power of
Court to
tender certain
oaths.

8. If any party to, or witness in, any judicial proceeding offers to give evidence on oath or solemn affirmation in any form common amongst, or held binding by, persons of the race or persuasion to which he belongs, and not repugnant to justice or decency, and not purporting to affect any third person, the Court may, if it thinks fit, notwithstanding anything hereinbefore contained, tender such oath or affirmation to him.

Court may
ask party or
witness
whether he
will make
oath proposed
by opposite
party.

9. If any party to any judicial proceeding offers to be bound by any such oath or solemn affirmation as is mentioned in section eight, if such oath or affirmation is made by the other party to, or by any witness in, such proceeding, the Court may, if it thinks fit, ask such party or witness, or cause him to be asked, whether or not he will make the oath or affirmation :

Provided that no party or witness shall be compelled to attend personally in Court solely for the purpose of answering such question.

Respecting the oath of purgation amongst the ancient Jews, the reader is referred to *Exodus* xxii., 9-10; *Lev.* v., 23. Oaths of purgation and judicial oaths are not forbidden by the founder of Christianity. In his sermon on the Mount, *Matt.* 3-6, he restricted his condemnation to rash and foolish oaths in ordinary communications between his actual or professing disciples. The oath prescribed by this and the three following sections has no counterpart in England. It has however in France, as may be seen in the following extracts from the French Codes.

CODE CIVIL.—L. III., J. III., C. VI. SECTION IV.

De l'Aveu de la Partie.

L'aveu qui est opposé à une partie est ou extrajudiciaire ou judiciaire.

L'allégation d'aveu extrajudiciaire purement verbal est inutile toutes les fois qu'il s'agit d'une demande dont la preuve testimoniale ne serait point admissible.

L'aveu judiciaire est la déclaration qui fait en justice la partie ou son fondé de pouvoir spécial. Il fait pleine foi contre celui qui l'a fait. Il ne peut être divisé contre lui. Il ne peut être révoqué à moins qu'on ne prouve qu'il a été la suite d'une erreur de fait. Il ne peut être révoqué sur prétexte d'un erreur de droit.

SECTION V.

Du Serment.

Le serment judiciaire est de deux espèces : (1) Celui qu'une partie défère à l'autre pour en faire dépendre le jugement de la cause ; il est appelé décisoire. (2) Celui qui est déféré d'office par le juge à l'une ou à l'autre des parties.

Du Serment décisoire.

Le serment décisoire peut être déféré sur quelque espèce de contestation que ce soit.

Il ne peut être déféré que sur un fait personnel à la partie à laquelle on le défère.

Il peut être déféré en tout état de la cause et encore qu'il n'existe aucun commencement de preuve de la demande ou de l'exception sur laquelle il est provoqué.

Celui auquel le serment est déféré qui le refuse ou ne consent pas à le référer à son adversaire ou l'adversaire à qui il a été référé et qui le refuse doit succomber dans sa demande ou dans son exception.

Le serment ne peut être déféré quand le fait qui en est l'objet n'est point celui de deux parties mais est purement personnel à celui auquel le serment avait été déféré.

Lorsque le serment déféré ou référé a été fait l'adversaire n'est point recevable à en prouver la fausseté.

La partie qui a déféré ou référé le serment ne peut plus se rétracter lorsque l'adversaire a déclaré qu'il est prêt à faire le serment.

Le serment fait ne forme preuve qu'au profit de celui qui a déféré ou contre lui et au profit de ses héritiers et ayant cause ou contre eux. Néanmoins le serment déféré par l'un des créanciers solidaires au débiteur ne libère celui-ci que pour la part de ce créancier. Le serment déféré au débiteur principal libère également les cautions. Celui déféré à l'un des débiteurs solidaires profite aux codébiteurs. Et celui déféré à la caution profite au débiteur principal. Dans ces deux derniers cas le serment du codébiteur solidaire ou de la caution ne profite aux autres co-

débiteurs ou au débiteur principal que lorsqu'il a été déféré sur la dette et non sur le fait de la solidarité ou du cautionnement.

Du Serment déféré d'Office.

Le juge peut déférer à l'une des parties le serment ou pour en faire dépendre la décision de la cause ou seulement pour déterminer le montant de la condamnation.

Le juge ne peut déférer d'office le serment soit sur la demande soit sur l'exception qui est y opposée que sous les deux conditions suivantes: (1) Il faut que la demande ou l'exception ne soit pas pleinement justifiée. (2) Qu'elle ne soit pas totalement dénuée de preuves. Hors ces deux cas le juge doit ou adjuger ou rejeter purement et simplement la demande.

Le serment déféré d'office par le juge à l'une des parties ne peut être par elle référé à l'autre.

Le serment sur la valeur de la chose demandée ne peut être déféré par le juge au demandeur que lorsqu'il est d'ailleurs impossible de constater autrement cette valeur. Le juge doit même en ce cas déterminer la somme jusqu'à la concurrence de laquelle le demandeur en sera cru sur le serment.

The elegant, clear, and methodical character of the French rules of evidence has induced us to collect them in a systematic form. Want of space prevents us setting before our readers more than the divisions of the system. The students of general jurisprudence will find in the rules much to repay consideration.

- I. The proof of obligations and their discharge :
Code Civil, 1315-1369.
- II. Inquisitions: *Code de Procedure Civile*, I. Titré, vii., and II., xii.
- III. The verification of documents: *Code de P. C.*, II. Titré, x.
- IV. Taking evidence: *Code d'Instruction Crim.*, articles 43-47.
- V. Documentary proofs: *Code d'Instruction Crim.*, ch. vi., section 4.
- VI. Evidence before a jury: *Code d'Instruction Crim.*, articles 312-332.

The High Priest of the Jews appears to have employed an oath like the French oath of decision at the trial of Jesus Christ. The whole trial is full of interest to the jurist.

From the facts of Christ's trial before the Supreme Council of the Jews, we see that witnesses were examined separately and without hearing each other's declaration, and that it was necessarily in presence of the accused; for with all the trouble that the Court took to produce false witnesses they could find none sufficient to bring guilt home to Jesus because their testimony did not accord: *Matt.* xxvi., 59; *Mark* xiv., 56. And even when at last two came forward whose declaration was really founded on a fact which they only varied a little, in order to make it amount to a crime, still their evidence did not coincide: *Mark* xiv., 29. For the one pretended to have heard Jesus say, "I can demolish the temple of God and

build it again in three days": *Matt.* xxvi., 61—a speech altogether unworthy to be laid hold of, for if it was but a piece of impudent gasconading, we must remember that people are not usually put to death for such bravadoes; and the other, *Mark* xiv., 51, "I will destroy the temple of God, which is built with hands" (words which Jesus never spoke, but on which alone the charge against him could be said to be founded, on the footing of his meaning the real temple of Jerusalem, and threatening to destroy it), "and in three days raise one not made with hands."

Had both these witnesses been admitted into court together this contradiction might easily have been avoided. We see that Jesus was present when he gave his evidence, for the High Priest asked him, saying: "Answerest thou nothing to what these witnesses testify against thee?": *Matt.* xxvi., 62. But he held his peace because he knew that their evidence could not criminate him, and that they had besides contradicted each other: see Michaelis' *Laws of Moses*, 299, and Greenleaf.

10. If such party or witness agrees to make such oath or affirmation, the Court may proceed to administer it, or if it is of such a nature that it may be more conveniently made out of Court, the Court may issue a commission to any person to administer it, and authorize him to take the evidence of the person to be sworn or affirmed and return it to the Court. Administration of oath if accepted.

11. The evidence so given shall, as against the person who offered to be bound as aforesaid, be conclusive proof of the matter stated. Evidence conclusive as against person offering to be bound.

Procedure in
case of refusal
to make oath.

12. If the party or witness refuses to make the oath or solemn affirmation referred to in section eight, he shall not be compelled to make it, but the Court shall record, as part of the proceedings, the nature of the oath or affirmation proposed, the facts that he was asked whether he would make, and that he refused it, together with any reason which he may assign for his refusal.

V.—Miscellaneous.

Proceedings
and evidence
not invali-
dated by
omission of
oath or irregu-
larity.

13. No omission to take any oath or make any affirmation, no substitution of any one for any of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, substitution, or irregularity took place, or shall affect the obligation of a witness to state the truth.

Persons
giving evi-
dence bound
to state the
truth.

14. Every person giving evidence on any subject before any Court or person hereby authorized to administer oaths and affirmations shall be bound to state the truth on such subject.

All manner of false witness in judgment was prohibited, as well that whereby an innocent person was aggrieved, as that whereby a guilty person was acquitted and a crime really committed by him was denied; or what in a Hebrew Tribunal was the same thing, where a witness concealed the truth after being solemnly adjured to declare it. In a particular manner we find the legislator exhorting the Israelites not to follow the multitude in testifying a falsehood and swerving from the truth, nor yet out of com-

passion to a poor man to give a partial evidence in his behalf: *Ex.* xx., 13; xxiii., 1-3.

In the Hebrew polity when a witness brought a false criminal charge against another person he rendered himself liable to the penalties of the *Lex Talioris*: see *Deut.* xix., 16-21.

Where, however, a witness, through inadvertence, or without malice, omitted to testify all that he knew against a guilty person, or in any other respect concerning the matter in question, and in consequence thereof felt disquieted in his conscience touching his oath, he might obtain remission of his sin by a confession thereof, accompanied with a trespass offering: *Lev.* v., 1.

15. The Indian Penal Code, sections 178 and 181, shall be construed as if, after the word "oath," the words "or affirmation" were inserted. Amendment of Penal Code, sections 178 and 181. •

16. Subject to the provisions of sections three and five, no person appointed to any office shall, before entering on the execution of the duties of his office, be required to make any oath, or to make or subscribe any affirmation or declaration whatever. Official oaths abolished.

It may not be inappropriate after our many remarks on judicial evidence to conclude with a short note on historical evidence.

Historical evidence, so wrote no mean authority, Sir George C. Lewis,* like judicial evidence, is founded on the testimony of credible witnesses. Unless these witnesses had personal and immediate

* Credibility of the Early Roman History, p. 16.

perception of the facts which they report, unless they saw and heard what they undertake to relate as having happened, their evidence is not entitled to credit. As all original witnesses must be contemporary with the events which they attest, it is a necessary condition for the credibility of a witness that he be a contemporary, though a contemporary is not necessarily a credible witness. Unless, therefore, an historical account can be traced by probable proof to the testimony of contemporaries, the first condition of credibility fails.

In our opinion Sir George does not pay sufficient attention to historical monuments and existing customs. But to the extract may be added the reasons assigned by Mr. Forsyth, who was counsel to the India Office in England, "why we are justified in believing on historical grounds the truth of the narratives in the New Testament, excluding all considerations of its doctrines:—

"(1.) The contemporary nature of the testimony.

"(2.) The artlessness and apparent truth of the writers.

"(3.) The substantial agreement, together with the circumstantial variety of the statements of four different contemporary eye-witnesses.

"(4.) The undesigned coincidences which exist between the Gospels and the Acts on the one hand, and the Epistles on the other.

"(5.) The absence of any conceivable motive for fraud or falsehood.

“(6.) The difficulty, if not the absurdity, of supposing that the teachers of the purest morality should be engaged in the immoral work of propagating an imposture and forging documents.

“(7.) The utter absence of any contradiction to their statements during the first four centuries.

“(8.) The frequent reference to the words of the four evangelists by writers who lived in the first two centuries, showing that their narratives were then current and well-known.

“(9.) The adequacy of the cause for miraculous interposition if we believe in a benevolent creator and in the immortality of the soul.

“(10.) The sufficiency of the accounts to explain the phenomenon of Christianity as a religion, which now exists in the world, whereas no other theory has or can explain it.

“If these be not sufficient grounds for believing the truth of the accounts that have come down to us, I know not any historical fact which we are justified in believing.”—viii. *Transactions of the Victoria Institute or Philosophical Society of Great Britain*, No. 32.

SCHEDULE.

(See Section 2.)

PART I.—STATUTES.

Year and chapter.	Title.	Extent of repeal.
9 Geo. IV., c. 74.	An Act for improving the Administration of Criminal Justice in the <i>East Indies</i> .	Sections thirty-six and thirty-seven.
3 & 4 Wm. IV., c. 49.	An Act to allow Quakers and Moravians to make Affirmation in all cases where an Oath is or shall be required.	The whole Act, so far as it applies to British India.
3 & 4 Wm. IV.; c. 82.	An Act to allow the People called Separatists to make a solemn Affirmation and Declaration instead of an Oath.	The whole Act, so far as it applies to British India.
5 & 6 Wm. IV., c. 62.	An Act to repeal an Act of the present Session of Parliament, intituled "An Act for the more effectual Abolition of Oaths and Affirmations taken and made in various Departments of the State, and to substitute Declarations in lieu thereof; and for the more entire Suppression of voluntary and extra-judicial Oaths and Affidavits;" and to make other Provisions for the Abolition of unnecessary Oaths.	The whole Act, so far as it applies to British India.
1 & 2 Vict., c. 77.	An Act for permitting Affirmation to be made instead of an Oath in certain cases.	The whole Act so far as it applies to British India.

PART II.—ACTS.

Number and year.	Subject or title.	Extent of repeal.
IX. of 1836.	Commanding Officer's power to administer Oaths.	The whole.
XXI. of 1837.	Office Oaths and Declarations.	So much as has not been repealed.
V. of 1840.	An Act concerning the Oaths and Declarations of Hindoos and Mahomedans.	So much as has not been repealed.
XV. of 1843.	An Act for the more extensive employment of Uncovenanted Agency in the Judicial Department.	Section two.
XV. of 1852.	An Act to amend the law of Evidence.	Section twelve.
XII. of 1856.	An Act to amend the Law respecting the employment of Amceens by the Civil Courts in the Presidency of Fort William.	Section four.
VII. of 1857.	An Act for the more extensive employment of Uncovenanted Agency in the Revenue and Judicial Departments in the Presidency of Fort St. George.	Section two.
XII. of 1859.	An Act to make better provision for the trial of Pilots at the Presidency of Fort William in Bengal for breach of duty.	Sections twelve and fifteen.

Number and year.	Subject or title.	Extent of repeal.
XVIII. of 1863.	An Act to make provision for the speedy and efficient disposal of the business now pending in the Office of the Master of the High Court of Judicature at Fort William in Bengal, and to provide for the abolition of the Oaths now administered to Hindoos and Mahomedans in the said Court, and to amend the Code of Civil Procedure in respect of process issued out of the said Court in the exercise of its Original Civil Jurisdiction.	Section nine.
IV. of 1866.	An Act to amend the constitution of the Chief Court of Judicature in the Punjab and its Dependencies.	Section five.
II. of 1869.	An Act for the appointment of Justices of the Peace.	Sections seven and eight.
IV. of 1871.	An Act to consolidate and amend the laws relating to Coroners.	Section seven, and, in section thirty-eight, the words "and such deputy shall take and subscribe, before one of the Judges of the High Court, an oath that he will faithfully discharge the duties of his office."
VI. of 1871.	An Act to consolidate and amend the law relating to the District and Subordinate Civil Courts in Bengal.	Section thirteen.
VI. of 1872.	An Act to amend the Law relating to Oaths and Affirmations.	The whole.
XVIII. of 1872.	An Act to amend the Indian Evidence Act, 1872.	Section twelve.

Number and year.	Subject or title.	Extent of repeal.
Bombay Act VI. of 1866.	An Act to amend the Law relating to certain Declarations of Office in the Bombay Presidency.	The whole.
Bengal Regulation IV. of 1793.	A Regulation for receiving, trying, and deciding Suits or Complaints declared cognizable in the Courts of Dewanny Adawlut established in the several Zillahs, and in the Cities of Patna, Dacca, and Moorsshedabad.	So much of section six as has not been repealed.
Bengal Regulation III. of 1803.	A Regulation for receiving, trying, and deciding Suits or Complaints, declared cognizable in the Courts of Adawlut established in the several Zillahs in the Provinces ceded by the Nawaub Vizier to the Honourable the English East India Company.	So much of section seven as has not been repealed, and section eight.
Bengal Regulation IX. of 1833.	A Regulation to modify certain Portions of Regulation VII. of 1822, and Regulation IV. of 1828; to provide for the more speedy and satisfactory Decision of Judicial Questions cognizable by Officers of Revenue employed in making settlements under the above Regulations; for enforcing the Production of the Village Accounts; for the more extensive Employment of Native Agency in the Revenue Department; and to declare the Intent of Section V., Regulation VII. of 1822, touching Claims to Malikana.	Section nineteen.
Madras Regulation I. of 1803.	A Regulation for defining the Duties of the Board of Revenue, and for determining the Extent of the Powers vested in the Board of Revenue.	Sections two and three.

Number and year.	Subject or title.	Extent of repeal.
Madras Regulation II. of 1803.	A Regulation for describing and determining the Conduct to be observed by Collectors in certain cases.	Sections three and four.
Madras Regulation XIV. of 1816.	A Regulation for amending and modifying the Rules which have been passed regarding the Office of Vakeel or Native Pleader in the Courts of Civil Judicature.	Section five.
Bombay Regulation VI. of 1799.*	A Regulation for enacting the existing Rules for the Collection of Bombay Customs.	Section two, clause two, from and including the words "Previous to" down to the end of that clause.
Bombay Regulation II. of 1827.	A Regulation for defining the constitution of Courts of Civil Justice, and the powers and duties of the Judges and officers thereof.	Sections four and fifteen. In section eleven, clause one, the words "who previously to entering on the duties of their offices shall take and subscribe in open Court the oath contained in Appendix B."
Bombay Regulation XII. of 1827.	A Regulation for the establishment of a system of Police throughout the Zillahs subordinate to Bombay, for providing Rules for its administration, and for defining the Duties and Powers of all Police Authorities and Servants.	Appendix B. So much of section three, clause five, as has not been repealed.
Bombay Regulation XIII. of 1827.	A Regulation for defining the Constitution of Courts of Criminal Justice, and the Functions and Proceedings thereof.	So much of section thirty-six, clause two, as has not been repealed.

* Printed at p. 246 of Clarke's edition of the Bombay Regulations, London, 1851.

Number and year.	Subject or title.	Extent of repeal.
Bombay Regulation XVI. of 1827.	A Regulation defining the Duties of the Collector, and his Powers in regard to Subordinate Revenue Officers, and providing Rules for the guidance of Land Revenue Officers in general, throughout the Territories subordinate to Bombay.	Section three, and so much of section five as relates to taking oaths.
Bombay Regulation XIX. of 1827.	A Regulation for the Presidency, prescribing Rules for the Assessment and Collection of the Land Revenue, and for collecting Taxes on Shops and Stalls, on beating the Battace or making Proclamation by the Crier, on Country Music, on Wedding Sheds and Places of Public Amusement, on Houses, on Carriages, and on Horses; for causing Individuals who may sell or transfer Houses or Tenements subject to quit or ground rents to give Notice of the same to the Collector; and also for levying Fees in the Court of Petty Sessions and Police Offices.	Section one, clause two, and section six from and including the words "and shall" down to the end. Appendix A.
Bombay Regulation XVIII. of 1830.	A Regulation providing for the appointment of a Joint Judge within the Zillah of Poona.	Section two.

APPENDIX A.



PRECEDENTS OF INTERROGATORIES.

THE faculty of successful examining of a witness is usually supposed to be a natural gift. But like other powers of the mind it may be strengthened and corrected and otherwise improved, though not created, by education. No training previous to entering the arena is likely to be so serviceable as a study of the problems of a case displayed in a good form of interrogatories. We are fortunate, therefore, in being able to lay before our readers several forms which were drafted or collected by that most able judge, Chief Justice Petheram, when a barrister at the English bar. As these forms relate exclusively to civil business, we have placed before them certain statements of fact which may easily be changed into interrogatories useful for examination purposes in criminal cases.

1.

As instances of physical facts which are frequently the subject of juristical treatment, we take the following extract from Taylor's Medical Jurisprudence. The learned author is directing the attention of medical jurists to the principal points calling for attention in cases of suspected poisoning. He classifies them under two heads. I. Symptoms. II. Inspection of the body; and thus discusses them:—

Symptoms.—1. The times of their occurrence—their nature. 2. The exact period at which they were observed to take place after a meal, or after food or medicine had been taken. 3. The order of

their occurrence. 4. Whether there was any intermission or remission in their progress. 5. Whether the patient had laboured under any previous illness. 6. Whether the symptoms were observed to recur more violently after a particular meal or after taking any particular kind of food or medicine. 7. Whether the patient has vomited; the vomited matters, if any, especially those first ejected, to be procured; their colour noted as well as their quantity. 8. If none be procurable, and the vomiting has taken place on the dress, furniture, or floor of the room, then a portion of the clothing, sheet, or carpet may be cut out and reserved for analysis—if the vomiting have occurred on a deal floor a portion of the wood may be scraped or cut out—or if on a stone pavement then a clean piece of rag or sponge soaked in distilled water may be used to take away any traces of the poison. [An animal was poisoned by arsenic. No trace could be detected in the stomach, but it was easily found in a portion of deal floor rendered humid during the night by the liquid matter which the animal had vomited.] 9. Endeavour to ascertain the probable nature of the food or medicine last taken. 10. Ascertain the natures of all the different articles of food used at a meal. 11. Any suspected articles of food as well as the vomited matters to be sealed up in a proper vessel and reserved for analysis. 12. Note down in their own words all explanations voluntarily made by parties present, or who are supposed to be concerned in the suspected poisoning. 13. Whether more than one person partook of the food or medicine; if so, whether all these persons were affected, and how. 14. Whether the same kind of food had been taken before by the patient or other persons without ill effects following. In the event of the death of the patient it will be necessary for the practitioner to note down—15. The exact time of death, and thus determine how long a period the person has survived after having been first attacked with the symptoms. 16. Observe the attitude and position of the body. 17. Observe the state of the dress. 18. Observe all surrounding objects. Any bottles, paper, packets, weapons, or spilled liquid lying about should be collected and preserved. 19. Collect any vomited matter near the deceased. Observe whether vomiting has taken place in the recumbent position or not. If the person have vomited in the erect or sitting position the front of the dress will commonly be found covered with the vomited matters. In the event of a postmortem examination being ordered by a coroner—

20. Note the external appearances of the body, whether it be livid or pallid on the surface. 21. Note the state of the countenance. 22. Note all marks of violence on the person or discomposure of the dress, marks of blood, &c. 23. Observe the presence or absence of warmth or coldness in the legs, arms, abdomen, mouth, or axillæ. 24. The presence of rigidity or cadaverous spasm in the body. To give any value to the two last characters it is necessary for the practitioner to observe the nature of the floor on which the body is lying, whether it be clothed or naked, young or old, fat or emaciated. All these conditions create a difference in respect of the cooling of the body and the access of rigidity. 25. If found dead, when was the deceased last seen living or known to have been alive. 26. Note all circumstances tending to a suspicion of suicide or murder.

Inspection of the body.—27. The time after death at which the inspection is made. 28. Observe the state of the abdominal viscera. If the stomach and intestines are found inflamed the seat of the inflammation should be exactly specified, also all marks of ulceration, effusion of blood, corrosion or perforation. 29. The contents of the stomach should be collected in a clean graduated vessel. Notice (*a*) the quantity; (*b*) the odour, tried by several persons; (*c*) the colour; (*d*) alkaline or acid reaction; (*e*) presence of blood, mucus, or bile; (*f*) presence of undigested food; (*g*) other special characters. 30. The contents of the duodenum should be separately collected. 31. Observe the state of the large intestines, specially the rectum. 32. The state of the larynx, fauces, and œsophagus, whether there be in these parts any marks of inflammation or corrosion. 33. The state of the thoracic viscera, all morbid changes noticed. 34. The state of the brain.—1 Taylor, 2nd ed., p. 202. For the details to be observed in conducting a postmortem examination, see 1 Tidy ‘Legal Medicine,’ p. 290.

II.

INTERROGATORY AS TO A DEED OR OTHER INSTRUMENT.

Was not the deed [*or*] bearing date the day of
A.D. in the plaints mentioned or some other and what deed [*or*
] of some other and what date, made between the several

persons, and whether or not to the purport and effect in the plaint mentioned and set forth in that behalf, or between some and what other persons, or to some and what other purport and effect?

III.

INTERROGATORY AS TO DOCUMENTS.*

Have not the defendants, or some or one and which of them now, or had not they, or some or one and which of them heretofore, and when last in the possession or power of them, or some or one of them, or in the possession or power of their, or some or one of their agents or agent, and whom by name and address some and what deeds or deed, agreements or agreement, accounts or account, books of accounts or book of account, cash-books or cash-book, or other books or book, letters or letter, bills or bill of costs, receipts or receipt, vouchers or voucher, memoranda or memorandum, or some and what other documents or document, paper writings or paper writing, or some and what copies or copy, extracts or extract, of or from the several particulars aforesaid, or from some or one and which of them referring or relating to the several matters herein-before stated, or to some and one and which of them, and would not the truth of such matters, or of some or one and which of them, appear by such particulars if the same were produced?

Let the defendants severally set forth a full, true, and perfect list or schedule of all such particulars, distinguishing those which now are from those which once were, but are not now, in their respective possession or power.

IV.

INTERROGATORIES TO THE PLAINTIFF IN AN ACTION OF
EJECTMENT.

1. In what character or in what right do you and each of you claim to be entitled to the possession of the premises claimed by you in this action?

2. Do you or any of you claim to be entitled to the same as heirs of deceased?

3. If so, how do you allege that you or any of you are his heirs at law, and through what links do you claim such heirship?

4. Do you or any of you claim to be entitled as grantees from or trustees of any person or persons claiming to be heirs at law of the said ?

5. If so, who is or are the person or persons whose grantees or trustees you or any of you claim to be, and how do you allege that such person or persons is or are the heirs at law of the said , and through what links do you trace such heirship?

6. Have you, or any of you, any right to or interest in the said premises except as aforesaid, and if so, what is the nature of such right or interest?

V.

INTERROGATORIES TO PLAINTIFF IN AN ACTION ON A PROMISSORY NOTE.

1. Is it or is it not a fact that before the indorsement of the notes in the plaint mentioned, or one and which of them, you knew or had been informed that the said notes, or one of them, had been paid or satisfied in whole or in part; and if in part only according to such your knowledge or information has been paid or satisfied?

2. Is it or is it not the fact that there was no consideration or value for the indorsement of the said notes to you respectively in whole or in part only, and if in part only for how much was there no consideration?

3. When were the said notes respectively indorsed to you?

4. Is it or is it not the fact that before the indorsement to you of the said notes, or of one and which of them, you knew or had been informed that the defendants C. and F. were only sureties on the notes, or on one and on which of them, for the defendant S., and that the payees of the notes were trustees for a money club, and that the club or the said payees had given time to S. for the payment of the money secured by the notes, or of some and what part thereof?

5. Is it or is it not the fact that you sue for the benefit of the payees of the notes or for that of a money club?

6. Is it or is it not the fact that the notes were indorsed to you because it was supposed that you would have a better chance of recovering, or a chance of recovering more in the action than the payees of the notes would have had if they had sued?

7. Is it or is it not the fact that before the indorsement to you of the said notes and of one and of which of them you knew or had been informed that there was some objection to suing in the name of the said payees, and what was that objection which you so knew or were informed of?

VI.

INTERROGATORIES TO PLAINTIFF IN AN ACTION AGAINST A PARTNER WHO HAD RETIRED FROM A FIRM FOR THE PRICE OF GOODS SUPPLIED TO THE FIRM TO DISCOVER WHETHER THE GOODS WERE SUPPLIED ON HIS CREDIT.

1. Were not the goods, the subject-matter of this action, ordered and bought of you by the firm of _____, and were they not invoiced by you to the firm of _____, carrying on business at _____, or to some other and what firm?

2. Did you at or before the dates of the orders for the purchases of the goods, or any of them, know who were the persons who composed the firm to whom you sold the said goods? Did you not know that the defendant was not a member of it? Did you then believe him to be a member of it, or had you not reason to believe that he was not a member of it?

3. Did you at the time when you accepted the orders for buying the goods in question, or any of them, really give any credit whatever to the defendant or to the firm to whom you sold the goods on the supposition and belief that the defendant was a member of such firm?

4. Did you at any and what time before the orders for and supplies of the goods in question make any and what inquiries of any and of what person or persons as to the connexion of the defendant with the firm to whom you sold the goods? If yea, state the result of such inquiries.

VII.

INTERROGATORIES TO, DEFENDANT IN AN ACTION ON A BILL OF EXCHANGE, THE DEFENCE BEING THAT THE ACCEPTANCE IS FORGED.

1. Do you not know that about the early part of A.D. 1888 *P. P.* was in the habit of purchasing goods of the plaintiff in this action for the purposes of his trade?

2. Do you not know that shortly before the month of _____ the said *P. P.* had fallen behind in his payments for certain goods sold to him by the plaintiff, and that about that time the plaintiff refused to supply him with any more goods?

3. Did not the said *P. P.* apply to you about the month of _____ to become surety for the payment of the price of the said goods?

4. Did you not about the time in the third interrogatory mentioned consent to the said *P. P.* drawing bills upon you to be indorsed by the said *P. P.* to the plaintiff as a security for the price of goods to be delivered by the plaintiff to the said *P. P.*?

5. Have you at any time since the said month of _____ accepted bills drawn on you by the said *P. P.*? If yea, what number of bills have been so accepted by you and when were they so accepted?

6. Have you ever authorised any person to accept in your name bills drawn on you by the said *P. P.*?

7. Did you not either by yourself or your agent accept the bill mentioned in the first count of the plaint for and dated _____, and drawn upon you by the said *P. P.*?

8. Have you not from time to time since _____ received notice from the plaintiff of the dishonour of certain bills drawn by *P. P.* on you and accepted by you?

9. Did you not in the beginning of the month of _____ receive notice from the plaintiff of the dishonour of the bill mentioned in the plaint? Did you not on _____ day _____, or some other, and what day, in answer to a letter received from the plaintiff containing notice of the dishonour of the bill mentioned in the plaint, write and send to the plaintiff a letter of which the following is a copy?—

Date.

SIR,—In answer to your letter received yesterday I am very sorry to find that the bill is dishonoured. I am aware that my friend *P. P.* is rather hard up for cash at present, being unable to

obtain cash from his customers, their rent day being next week. I sincerely hope you will wait a month for payment. Be so good as to send tea as usual to *P. P.* and I will accept a bill for the same.

Yours, &c.,

J. O.

To Mr.

10. Did you not on the day of , or some other, and what day, write and send to the plaintiff a letter of which the following is a copy:—

Date.

SIR,—If the tea is sent as usual you may depend upon the bill being paid when due. *P. P.* desires me to ask you to send him good tea; the balance will be settled, that is if you will be kind enough to wait for a month.

Yours, &c.

To Mr.

11. Was there, or is there, or were there, any document or documents relating to the acceptance by you of any bills drawn on you by the said *P. P.* since the month of , and, if yea, state what such document or documents is or are, and whether it or they is or are in your power, custody, or control, and if you ever had possession of the same, when did you have it, and to whom, if at all, did you part with such possession, and when?

12. Have you had any communications with the said *P. P.* since the commencement of this action, and what were they?

VIII.

INTERROGATORIES BY A PLAINTIFF IN AN ACTION BY INDORSEE AGAINST ACCEPTOR OF A BILL OF EXCHANGE.

1. When did you first become the indorsee of the bill of exchange mentioned in the plaint in this action?

2. Was *A. B.* the holder of the said bill at the time it was indorsed to you, and did you take it from him? If not, who was the holder from whom you took the said bill?

3. What, if any, was the consideration for which the said bill was indorsed to you, and what were the circumstances under which, and the reasons why, it was indorsed to you?

4. What, if any, was the value or consideration for which you held the said bill at the commencement of this suit?

5. Before and at the time the said bill was indorsed to you did you know or had you notice of or had you any and what reason to believe and suppose any and which of the following matters, that is to say?—1. That the defendant accepted the said bill for *A. B.*'s accommodation. 2. That there was no consideration or value for the said acceptance. 3. That *A. B.* never was holder of the said bill for value. 4. That the defendant had revoked *A. B.*'s authority to negotiate the said bill. 5. That *A. B.* had been requested to return the said bill to the defendant. 6. That *A. B.* negotiated the said bill without the defendant's authority or consent. 7. That *A. B.* had promised the defendant that he would return the said bill to the defendant.

6. Did you commence and do you prosecute this suit for your own sole benefit, or for the benefit in whole or in part of any other person, and whom? And if you answer that in any respect you sue for the benefit of any person other than yourself, what is the interest which such person has in the said bill or in this action?

7. Did you commence this action at your own cost and risk, or in whole or in part at the cost and risk of some other person, and what person? and if you answer that you did so at the cost and risk of any other person than yourself, how and why is it that such person is to bear or participate in such cost or risk?

8. Have you ever been and are you now indemnified by any and what person against the cost of this action or any part thereof? If yea, why did he so indemnify you?

If you took the said bill not from *A. B.* but from some other holder, then, and not otherwise, answer the following interrogatories.

9. When did such other holder become the holder of the said bill, and from whom did he take the same?

10. What, if any, was the value or consideration for which the said bill was indorsed to such holder, and what were the circumstances under which, and the reason why, it was indorsed to him?

11. What, if any, was the value or consideration for which he held the said bill, at the time when he transferred it to you?

12. Before and at the time when it was indorsed to you, did you know or had you any reason to suppose or believe that such other

holder before or at the time when he became holder of such bill knew or had notice of any or which of the matters above specified in the fifth interrogatory?

IX.

INTERROGATORIES TO PLAINTIFF IN AN ACTION BY INDORSEE ON A BILL OF EXCHANGE, WHERE IT HAS BEEN PLEADED THAT THE ACCEPTANCE HAD BEEN OBTAINED BY FRAUD, AND THE BILL INDORSED TO THE PLAINTIFF WHEN OVERDUE, AND WITHOUT CONSIDERATION, HE HAVING NOTICE OF THE FRAUD.

1. Are you the holder of the bill of exchange mentioned in the plaint?

2. Were you the holder, and were you in possession of it at the time of issuing the in this action?

3. On or about what day did you first become the holder of the said bill? Did you become such holder before it became due?

4. From whom did you get the said bill?

5. Did you get it from *A. B.*, the drawer? *

6. Did he indorse it to you?

7. When did he indorse it? Was it before or after the said bill became due?

8. Was there any and what consideration or value for the indorsement of the said bill by him to you? State fully and particularly what the consideration or value was, and the whole of it, and when it was given or made, whether in cash or how otherwise, and the names and addresses of all the parties present when it was given, or when it was agreed to be given or made, to the best of your knowledge, information, and belief.

9. Under what circumstances did you become the indorsee and holder of the said bill? State fully and particularly those circumstances.

10. Did you know the circumstances under which the defendant parted with the said bill?

X.

INTERROGATORIES TO DEFENDANT IN AN ACTION FOR MONEY LENT
AND ON AN ACCOUNT STATED.

1. Did not the plaintiff on or before the day of A.D. 1888, advance and lend to you, or did you not have from him, and on what account, and for what purpose, a loan of £ , or sums of money amounting to £ , or any other and what sum or sums? Did you give him or did he have any and what security for the repayment of the same? State the whole of the moneys so lent to or had by you.

2. Did he not lend to you, or did you not have from him on some and on what account, and for what purpose, £ on the day of ?

3. Did not the plaintiff to your knowledge have an account with and moneys deposited at bank, and did you not have at various times, and when, his pass book showing his account at the said bank? For what purpose did you have it?

4. Did you at any time, and at what time or times, receive from the said bank any and what sum or sums of money on the plaintiff's account, or by his order or authority?

5. Did you ever, and at what time or times, pay any and what sum or sums of money on the plaintiff's account at the said bank and, if so, to whom did the moneys so paid belong?

6. Have you or have you not at any and what time or times paid any, and what sum or sums of money, to the plaintiff, or to the said bank, or to any and what person or persons on the plaintiff's account in payment of any moneys lent by him to you, or had from him by you, or as interest for the forbearance of the same?

7. Have you made any and what admissions at any and at what time or times to any and what persons, of your having borrowed or owing any and what moneys of or to the plaintiff?

XI.

INTERROGATORIES AS TO A COMPOSITION DEED.

1. What business did you carry on prior to , and where were your office and place of business, and where were your manufacturing factories?

2. Who first suggested the deed mentioned and set forth in the defence in this action; who named the trustees therein and required them to act? Are they, and is either, and which of them, creditors, and, if so, for what amount or amounts? Were they or was either of them in your employ prior to _____, and are they or is either, and which of them, now in your employ?

3. Set out when and where you executed the deed, and when and where it was executed by the trustees?

4. Was there any meeting of your creditors held prior to _____? If you allege that there was any such meeting, set out by whom it was called and where it was held, and by whom it was attended, and what passed at such meeting.

5. Who applied to the creditors for their consent or approval of the deed? Set out the names, addresses, and occupations of the persons who have assented to or approved of the deed, the date of such approval or consent, and the amount of each debt, distinguishing those persons who hold security, and setting out the nature of the security held by each.

6. Have you paid to any or either, and to which of the persons who assented to and approved of the deed, the whole or any part of the debts in respect of which they proposed to assent or approve? If so, set out the date and amount of each such payment.

7. Have any or has either of the persons who consented to and approved of the deed, and at that time held security for the debts realised or received the securities held by them or him, or otherwise, been paid the amount of their or his debts? If so, set out the amounts received by each such creditor, and the date of such receipt.

8. Have you or has either and which of the creditors who assented to or approved of the deed received from any source whatever, the whole or any part of the debts in respect of which they or he so assented or approved? If so, set out the name or names of the person or persons who have so received, and the date and amount of each receipt.

9. Set out a full list of the debts and liabilities due or incurred by you prior to _____, with the names, addresses, and occupations of each of your creditors, the amount of the debts, the amount due to each, and the securities held by each.

10. Had you prior to _____, and have you now in your custody, possession, or power, or in the custody, power, or control of your solicitor, attorney, or agents, any books, letters, ledgers, papers,

documents, memorandums, or writings, relating to your business transactions prior to ? If so, set out a full and perfect list of such books, letters, ledgers, papers, documents, memorandums, and writings, and if you allege that you had any of such matters prior to but have since parted with them, or any of them, set out when you last saw such document, where, why, and to whom you parted with it, and in whose possession it now is.

11. Set out a list of the papers and writings by which the creditors assented to and approved of the deed referred to in the defence.

XII.

INTERROGATORIES TO PLAINTIFF IN AN ACTION ON A GUARANTY.

1. At the date of the guaranty sued on in this action was not *C. R.* who is named in the said guaranty in debt to you for £ , or in some other and what sum of money, and was any and what part of the debt secured, and how?

2. Had you not before the date of the said guaranty required the said *C. R.* to make cash payments for goods sold by you to him, and particularly in the months of , A.D. 1886?

3. Had not the said *C. R.* in fact paid you in cash less a discount of 25 per cent. for the goods which you supplied to him in the months of before the date of the said guaranty, and for some and for which of such goods, or for the amount due for such goods, within a pound or two; were not such payments or some of them, and which, made because you required the said *C. D.* to make them, or because you declined to give him credit for the said goods, or some of them?

4. Did you ever inform the defendant before the said guaranty was given of any and of which of the facts mentioned in your answers to the foregoing interrogatories?

5. Did you not after the said guaranty was given sell and deliver goods to the said *C. R.* on credit, and if so on what credit, and for what terms as to time and mode of payment? Were not the goods, in respect of which this action is brought, sold to him on some and on what terms as to credit?

6. Did you not on or about the day of take some and what bill of exchange from the said *C. R.* for £ , and was

not that amount due from him on account of goods which he had had of you in the previous months of _____, and at what dates in those months?

XIII.

INTERROGATORIES TO DEFENDANT TO DISCOVER WHETHER HE ENTERED INTO THE CONTRACT ON WHICH THE ACTION WAS BROUGHT AS PRINCIPAL OR AGENT.

1. Did you enter into the contract in the plaint mentioned as agent or as principal? -

2. If you entered into the said contract as agent, for whom and by what authority did you enter into it?

3. Are there any entries in your books which show who was the principal for whom you acted in entering into the said contract, or is there any entry in your contract book, to that effect?

4. Has any money paid to you in respect of the contract in the plaint mentioned been paid over to such principal? If yea, when and how? -

5. Have you any entry in your pass book or other book or books which show such payments?

XIV.

INTERROGATORIES TO DEFENDANT IN AN ACTION FOR PRICE OF BUSINESS.

(This example will be found useful whenever interrogatories are required to be administered to the defendant in an action for debt.)

1. Did you not in or about the month of _____ purchase or agree to purchase of the plaintiff certain stock-in-trade, materials, and fixtures, and the goodwill of his business as a _____ at _____; and also the lease of the premises where the said business was carried on, and, if so, for what sum or sums of money did you agree to purchase, or purchase the same or any part thereof?

2. Was not a draft of an agreement for the said purchase pre-

pared, and is not the same in your possession, custody, or power; and if not, where is it?

3. Did you not take possession of the said stock-in-trade, materials, and fixtures, and of the said business, and of the said premises, and afterwards carry on the said business as purchaser thereof?

4. Have you not paid some, and, if yea, what sum or sums on account of the said purchase-money?

5. Have you in your possession, power, or control, any letters, papers, writings, or other documents relating to the purchase by you of the above-mentioned business other than the draft agreement in the second interrogatory mentioned? If yea, give a complete list of such letters, papers, writings, and other documents.

XV.

INTERROGATORIES TO DEFENDANT IN AN ACTION OF EJECTMENT AS TO WHETHER, HE WAS DEFENDING ON HIS OWN RESPONSIBILITY.

(In England any application for leave to administer such interrogatories must be supported by a special affidavit showing ground for the supposition that he was not so defending, and that they were not fishing ones, that is, filed in the hope of discovering a chance of defence.)

1. Is not *A. B.*, of [London], the real defendant in this action, defending it in your name to protect his own interest? (If you answer this question positively in the affirmative without qualification, you need not answer any of the following interrogatories.)

2. Was the copy of the _____ by which this action was commenced ever delivered to you or to any person on your behalf? If not, when, as near as you can remember, did the fact that it had been issued or that this action had been commenced against you come to your knowledge?

3. Did you ever, and when, as near as you can remember, give, or instruct or authorize any one and whom to give, notice of such _____ or of the said writ to *A. B.*, or to any one on his behalf? If yea, did you do so because you considered the said *A. B.* to be

your landlord? Where does the said *A. B.* reside? Did you instruct or authorise Mr. *C. D.* to appear for you in this action?

4. Is there any agreement, arrangement, or understanding according to which you are not to pay, and the said *A. B.* is to pay, the said Mr. *C. D.* the costs of defending this action or any part thereof? If yea, what is it?

5. Did the said *A. B.*, or any one on his behalf, and who, do any and which of the things mentioned in the following paragraphs numbered from (1) to (6) inclusive?

(1.) Apply to you for leave for the said *C. D.* to enter an appearance in your name in this action?

(2.) Apply to you for leave for the said *C. D.* to defend this action in your name?

(3.) Agree that the said *A. B.* should indemnify you against the plaintiff's costs in this action or some part thereof?

(4.) Agree that the said *A. B.* should indemnify you against the costs of the defence or some part thereof?

(5.) Employ the said *C. D.* to defend this action?

(6.) Agree to pay the said *C. D.* the costs of the defence of this action or some and what part thereof?

6. Have you any and what reason to suppose or believe that the said *A. B.* will indemnify you against the plaintiff's costs in this action, or any and what part thereof?

7. Have you any and what reason to believe that the said *A. B.* will pay the costs of the defence of this action?

8. Have you any and what reason to suppose or believe that the said *A. B.* claims to be entitled to the rents of the said premises, or any of them?

9. Have you paid rent for part of the said premises to the said *A. B.*, or to any one and whom on his behalf, and for how long have you done so?

10. Have you in your possession receipts for rent paid by you in respect of the said premises during the last six years, and what are the dates of those receipts?

NOTE.—The recent case of *Lyell v. Kennedy* has changed the law; and now a plaintiff in ejectment has a right to interrogate the defendant as to all matters relevant to the plaintiff's but not to the defendant's case (II. L. 8 App. Cas. 2).

XVI.

INTERROGATORIES TO OFFICERS OF RAILWAY COMPANIES IN AN
ACTION AGAINST A COMPANY FOR INJURIES SUSTAINED BY
A PASSENGER AS TO THE CAUSE OF THE ACCIDENT BY WHICH
THE INJURIES WERE CAUSED.

1. What are the names and addresses of the guard or other servant or servants of the defendants who was or were attached to the train of the defendants which was to have left the Calcutta terminus or station on the day of , at about o'clock, and of the porters and other servants of the defendants who were at the said station at that time?

2. Did a truck run against the said train whilst the said train was stopping in the said station, and did you see a truck not being a part of the said train close to the said train where the said truck ought not to have been? And did you hear a noise as if the truck or something else had run against the said train? And did the said truck belong to the defendants, and was it under the care of a servant or servants of the defendants? And what is and are the name and names, address and addresses, of the servant or servants of the defendants?

3. Did the said truck run against the train with so much violence as to cause a sudden shock to the train or to cause the said train to be suddenly moved?

4. What caused the said truck to run against the said train?

5. What put the said truck in motion? At what distance from the train was it when first put into motion?

6. Was it or was it not attached to an engine when first it ran against the train?

7. Had it been moved by an engine? and when it ran against the said train was the motion given to it by the engine still continuing?

8. At what distance from the said train was the said truck at the time when it became separated from the engine, or ceased to have motion imparted to it from the engine to which it had been attached?

9. At what rate, as near as you can judge, was the said truck moving when it ran against the said train? and what is the highest degree of velocity which you will swear it did not exceed?

10. Had the said truck any break or other appliance annexed to

it for the purpose of stopping or retarding the velocity with which it was moving?

11. Have the defendants ever had in their possession any report or reports, letter or letters, writing or writings, relating, &c.? See III. and VII. 11.

XVII.

Interrogatories to defendant in action by indorsee against the maker of a promissory note. The defence was that a deed of arrangement had been executed under a Bankruptcy Statute. To this defence the plaintiff replied that divers of the debts of the majority in number of the creditors who assented to the deed were contracted by the defendant fraudulently, and for the sole purpose of creating a body of creditors of small amount who should make up the majority in number required by the statute to assent to the deed, and that many of the debts were contracted to clerks and servants of the defendant by letting their wages become in arrear, it being intended to pay them, and they having been paid in full after the registration.

NOTE.—No. XI. will supply some of the requisite questions.

XVIII.

INTERROGATORIES TO DISCOVER THE CONTENTS OF A LOST WRITTEN DOCUMENT. BEFORE USING THE ANSWERS, OR ON OBTAINING LEAVE TO ADMINISTER THE INTERROGATORIES, PROOF SATISFACTORY TO THE JUDGE THAT THE DOCUMENT HAD BEEN LOST WOULD HAVE TO BE PRODUCED.

1. Did you subscribe, or authorize any one to subscribe for you, £500 to the undertaking of the said company, and did you sign, or execute, or authorize, any one to sign or execute for you a subscription contract or document as the subscription contract or memorandum required to be made before the company could be incorporated?

2. Did you know _____, who was a clerk to _____? Did you sign the memorandum in his presence, or how otherwise?

XIX.

AFFIDAVIT IN ANSWER TO AN INQUIRY AS TO HEIRSHIP AND
KINDRED.

I, *J. H.*, of _____, make oath and say as follows:

1. *J. H.*, late of _____, the intestate in the
bearing date _____ day of _____ A.D., named was my son.

2. The said *J. H.* died on _____ day of _____ A.D. He
is the same person as _____ in the certificate marked _____,
now produced and shown to me, named and purporting to be a copy
of an entry.

3. The said *J. H.* was married twice only, namely (1) on the
day of _____ to *L. T.*, at the _____ church of _____ in the
city of _____; (2) and on the _____ day of _____ to
at the church of _____, in _____.

4. The said *J. H.* and *L. T.* are the same persons as _____,
bachelor, and _____, spinster, respectively named in the
certificate marked _____, now produced and shown to me, and
purporting to be _____.

5. The said *J. T.*, then *L. H.*, wife of the said *J. H.*, died on the
_____. She is the same person as _____, in the paper writing
marked _____, now produced and shown to me, and purporting to
be a copy under the seal of the General Register Office of the entry
No. _____, in the certified copy of entries of deaths in the district of
_____, for the year _____.

6. The said *J. H.* and *J. W.* are the same persons as
widower, and _____, widow, respectively named in the
register book of marriages.

7. The said *J. H.* had two children only by his wife *L. H.* for-
merly *L. T.*, namely, (1) *A. H.*, who was born on _____, and (2)
M. H., who was born on _____.

8. The said *A. H.* is the same person as Albert, son of *J.* and *L.*
Hughes, in the paper writing marked _____, now produced _____,
named and purporting to be a copy under the seal of the General
Register Office of the entry, No. _____, in the certified copy of entries
of births in the district of _____, in the county of _____
for the year _____.

9. The said *M. H.* is the same person as [follow § 8].

10. The said *M. H.* has been married once only, namely, on _____, to *T. J.*, at _____. They are the same persons as _____.

11. The said *J. H.* had no child by his wife *J. H.*, formerly the said *J. W.*, and now his widow.

12. The said *J. H.* and *A. H.*, and the said *T. J.* and Maria, his wife, formerly the said *M. H.*, are respectively now living.

13. [Show means of knowledge.]

NOTE.—The practitioner may draw for himself interrogatories in other cases, modelled upon the previous forms. He will in each case have to consider what facts must be proved or disproved in order to establish or controvert the legal proposition which may be in issue. To construct such a proposition a sound knowledge of law or equity is necessary.

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APPENDIX B.

DIFFERENCES BETWEEN THE ENGLISH AND THE INDIAN LAWS OF EVIDENCE.*

1. In England the particulars of the complaint may not be disclosed by the witnesses for the prosecution either as original or confirmatory evidence, and the details of the statement can only be elicited by the prisoner's counsel on cross-examination. Under the Indian Act, s. 8 (*j*) and (*k*), the terms of the complaint are admissible as original evidence.

2. To prove the existence of a conspiracy or to show that any person was a party to it, a letter giving an account of the conspiracy is admissible under the Indian Act, s. 10, even though not written in support of it or in furtherance of it. The contrary rule is followed in England.

3. In India the inducement which renders a confession inadmissible must proceed from the person in authority. In England it is sufficient if made by any one and sanctioned by the silence of the person in authority.

4. In India it is necessary to prevent the police from torturing persons in their custody for the purpose of extorting confessions. Therefore every confession to a police officer except in the presence of a magistrate is inadmissible. Not so in England.

5. In England the confession of an accused person is not evidence against any one beyond himself. Under the Evidence Act, s. 30, where two persons are being jointly tried as receiver and thief or otherwise, a confession by one of the prisoners may be used against the other. The judges construe the section strictly.

* We are indebted to Mr. Stokes in the main for this comparative view, of which every jurist must acknowledge the interesting character.

6. In England dying declarations are only admissible when the death of the deceased is the subject of the charge, and when made while the declarant is expecting death. In India they are admissible when not so made, and in all civil and criminal trials.

7. In England to make entries in the course of business admissible, they must be made contemporaneously with the acts to which they relate. In India there is no such restriction.

8. In England the declaration of an illegitimate member of a family would not be admissible in a pedigree case. In India the statements of friends, neighbours, servants, and of a deceased person respecting his own illegitimacy would be admissible.

9. In India statements made by deceased persons, and contained in documents relating to private persons, are admissible upon questions of private rights.

10. In England entries in registries and public books must have been promptly made, and in the manner, if any, required by law. The Evidence Act contains no such rule.

11. In England a foreign judgment is little more than evidence of a debt. In an action thereon the trustees of property of which the judgment debtor is beneficial owner cannot be joined as parties : *Hawkesford v. Giffard*, 12 App. Cas. 122.

INDIAN PECULIARITIES BEARING ON EVIDENCE.

1. In civil cases and in most criminal cases there is no jury. English rules, therefore, founded on the separation of the functions of the judge and jury are not so extensively applicable.

2. The practitioners in many of the Mufassal courts cannot yet be relied on to object to improper questions or to object to the admission of evidence or to take a note of the grounds on which a judge admits or rejects evidence. In cross-examination one question as to previous conviction and another as to enmity with the party against whom the witness is produced constitute the ordinary stock of the querist.

3. The police are more corruptible than in England. They are inclined to extract evidence by means of torture. Their object frequently is not only to discover a criminal but to affix criminality to an individual: they accordingly stimulate a culprit to exculpate himself by accusing an accomplice. In the Mufassal they prepare cases for trial, but they have little detective skill. They do not

understand what evidence is necessary or legally admissible. Their practice is to adopt a theory, in the support of which they mould the evidence, and even manufacture a necessary link when it cannot be otherwise supplied.

4. and 5. Witnesses in India are far less truthful, far less accurate in observation, especially of time and distance, than the corresponding class of witnesses in England, more timid, more revengeful, more apt to conspire to give false evidence, more prone to raise a false defence even when not guilty. It is rarely possible to accept and act upon direct evidence unless corroborated. "Oral evidence," said the High Court in the *Ramnad Case* (I. L. R. 2 M. S. 233), "is *prima facie* not entitled to belief, and in this country, where in a civil cause we say that we believe, our meaning can only be that being compelled to come to a conclusion it is more reasonable to come to one than to another." But judicial officers must not be too prone to be suspicious. They must form a deliberate judgment according to the ordinary legal and reasonable presumptions of fact: P.C. 14 Moore, I. A. 354.

6. The practice of drilling witnesses is far more frequent in India than in England.

7. Genuine confessions are frequently retracted by the natives. An oriental has not the same tenacity that a western has. The former is usually more or less a fatalist, says of the victim of his ungovernable rage that his time had come, and seeks for momentary peace by confessing the crime, thinking that his own time too has come. When the blandishments of the police are gone and he mixes with the other prisoners, his mind recovers a steadier balance, and he falsely retracts the truth which he had told.

8. Dying declarations are not entitled to the weight of those made in England. Very often the murdered man before his death implicates every member of his supposed murderer's family, or of the supposed instigator of the murder, hoping by this means to drink the cup of revenge to its last dregs, and to rid his own family of all future annoyance.

9. In England written documents are seldom executed except by those who can read and write and are capable of looking after their own interests. In India bonds are daily executed by men who are either too ignorant to understand a written document, or too poverty-stricken and helpless to contend with a mahajan or sahukar on equal terms.

10. In India the bulk of the internal trade is in the hands of gamashtas who are treated as the agents of their employers, and nearly every mercantile transaction is effected through the medium of dallals. It is therefore especially important that the admission of an agent in the matter of his agency should be taken as the admission of his principal.

11. The Indian Evidence Act is less strict in respect of the proof of foreign law than the English, in that it allows foreign law books to be referred to without the assistance of an expert.

12. In India judgments *in rem* are conclusive in criminal as well as civil proceedings. In the *Duchess of Kingston's Case* (State Trials, and 2 Smith, L.) it was decided that a judgment as to personal status was inadmissible in a criminal trial.

13. Section 44 permits a party to show that a judgment was obtained by his own fraud. The rule is otherwise in England.

14. In India—see section 45—on questions of sanity the opinions of experts only are receivable. In England ordinary witnesses may give an opinion as to the mental capacity of a testator.

15. The present Act allows a witness to be prejudiced in the trial by evidence of any previous conviction for crime. In England a previous conviction can only be used during the trial in answer to evidence of character.

16. In India the opinions of experts and the grounds thereof contained in treatises may be used should the expert be dead, and the treatise containing it be the evidence thereof.

17. Certificates of births, deaths, and marriages may in India be used in criminal trials.

18. Comparison of disputed seals no less than of disputed writings may be made by witnesses in both criminal and civil proceedings.

19. Section 112 does not permit the rebuttal of legitimacy by proof of impotency.

20. Section 118 renders the evidence of a child who understands the questions and can give rational answers admissible, though it believe not in a future state.

21. Section 120 makes husbands and wives competent witnesses for and against each other both in criminal and civil proceedings.

22. Section 131 gives a greater privilege to persons not parties to the suit as to the non-production of title-deeds than the English law does, notwithstanding forgery and fraud are so prevalent in India. For in England, when the deed has been partly set out or

fraud has been suspected, production has been ordered. The Indian Act ignores both trusts and implied agreements to produce deeds.*

23. In India a witness is not excused from answering a question which tends to expose him or her, his or her wife or husband, to a criminal charge; though such answer cannot be used against the witness except in a trial for false evidence.

24. In India, on trials for offences analogous to treason, for perjury, of bastardy, of breach of promise, a single witness may suffice.

25. Section 157 does not provide for the impeachment of the credit of a witness by evidence contradicting his statements. But it admits evidence of a prior statement if made contemporaneously with the fact or before a competent authority to corroborate his testimony.

26. The judge may ask any question he pleases in any form and at any time without giving counsel the right of cross-examining. The English rule is the direct opposite (18 Q. B. D. 537).

* In England a solicitor must produce a title document when his client would be bound to produce it: *Bursall v. Tunner*, C. A. 16 Q. B. D. 1.

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